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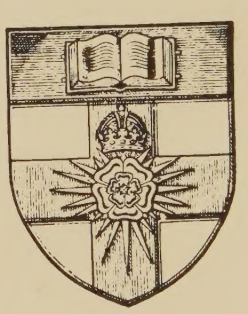

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THE

LAW REPORTS.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

REPORTED BY

CHARLES CLARK, Queen's Counsel;

JOHN FRASER MACQUEEN, Queen's Counsel;

HERBERT COWELL, Barrister-at-Law.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Allman, Doherty *v.* –	H. L. (I.)	709
Armytage *v.* Wilkinson –	P. C.	355
Attorney-General for Quebec *v.* Queen Insurance Company	P. C.	1090
Attorney-General of New South Wales, Platt *v.* – –	P. C.	336
Ayers, Levi *v.* – –	P. C.	842
——, Willans *v.* – –	P. C.	133

B.

Bailey, Read *v.* –	H. L. (E.)	94
——— *v.* Roberton –	H. L. (Sc.)	1055
Baird, Matson *v.* –	H. L. (Sc.)	1082
Bankes, Mackenzie *v.*	H. L. (Sc.)	1324
Bann Reservoir, Proprietors of, Geddis *v.* – –	H. L. (I.)	430
Bolckow, Chaloner *v.*	H. L. (E.)	933
Borjesson *v.* Carlberg	H. L. (Sc.)	1316, 1322
Bradley, Garnett *v.* –	H. L. (E.)	944
Breslauer *v.* Brown –	H. L. (E.)	672
Bristow *v.* Cormican	H. L. (I.)	641
British Fisheries Society, Dunbar's Trustees *v.* –	H. L. (Sc.)	1298
Brown, Breslauer *v.*	H. L. (E.)	672
Burah, Reg. *v.* – –	P. C.	889
Burkinshaw *v.* Nicolls	H. L. (E.)	1004
Buttery, Inglis *v.* –	H. L. (Sc.)	552

C.

Carlberg, Borjesson *v.*	H. L. (Sc.)	1316, 1322
Cave, Chatterton *v.* –	H. L. (E.)	483
Chaloner *v.* Bolckow	H. L. (E.)	933
Chambers *v.* Smith –	H. L. (Sc.)	795
Chatterton *v.* Cave –	H. L. (E.)	483
Cormican, Bristow *v.*	H. L. (I.)	641
Cox *v.* Rabbits –	H. L. (E.)	473
Cundy *v.* Lindsay –	H. L. (E.)	459
Cunningham *v.* Foot	H. L. (I.)	974

D.

Davenport *v.* Reg. – –	P. C.	115
Davidson *v.* Sinclair	H. L. (Sc.)	765
Doherty *v.* Allman –	H. L. (I.)	709

PAGE

Dublin, Wicklow, and Wexford Railway Company *v.* Slattery H. L. (I.) 1155
Dudgeon *v.* Thomson H. L. (Sc.) 34
Dunbar's Trustees *v.* British Fisheries Society H. L. (Sc.) 1298

E.

Edinburgh Street Tramways Company *v.* Torbain H. L. (Sc.) 58
Elphinstone (Lord), Perth and Melfort (Earl of) *v.* H. L. (Sc.) 297
Erlanger *v.* New Sombrero Phosphate Company – H. L. (E.) 1218
Eversheld, London and North Western Railway Company *v.* H. L. (E.) 1029

F.

Fisher *v.* Tully – – P. C. 627
Fleming *v.* Gray (Baroness) H. L. (Sc.) 1
Foot, Cunningham *v.* H. L. (I.) 974
Francis, Swire *v.* – – P. C. 106

G.

Gardner *v.* Lucas – H. L. (Sc.) 582
Garnett *v.* Bradley – H. L. (E.) 944
Gaslight and Coke Company, Patterson *v.* – H. L. (E.) 239
Geddis *v.* Bann Reservoir (Proprietors of) – – H. L. (I.) 430
Giddy, Webb *v.* – – P. C. 908
Graham, Taylor *v.* – H. L. (Sc.) 1287
Gray (Baroness), Fleming *v.* H. L. (Sc.) 1
———————, Richardson *v.* H. L. (Sc.) 1
Great Western Railway Company, Smith *v.* – H. L. (E.) 165
Grice *v.* Richardson – P. C. 319

H.

Hodgson's School, *In re* – P. C. 857
Hood *v.* Stallybrass – – P. C. 880

I.

Inglis *v.* Buttery – H. L. (Sc.) 552

J.

PAGE

Jackson, Metropolitan Railway Company *v.* – H. L. (E.) 193
Johnston *v.* Montreal (Ministers and Trustees of St. Andrew's Church) – – – P. C. 159

K.

Kerr, Lang *v.* – – H. L. (Sc.) 529
Kershaw *v.* Kirkpatrick – P. C. 345
Kirkpatrick, Kershaw *v.* – P. C. 345

L.

Lang *v.* Kerr – – H. L. (Sc.) 529
Les Sœurs Dames Hospitalières de St. Joseph de l'Hôtel-Dieu de Montréal *v.* Middlemiss P. C. 1102
Levi *v.* Ayers – – P. C. 842
Lindsay, Cundy *v.* – H. L. (E.) 459
London and North Western Railway Company *v.* Eversheld H. L. (E.) 1029
Lord Advocate, Zetland (Earl of) *v.* – – – H. L. (Sc.) 505
Lucas, Gardner *v.* – H. L. (Sc.) 582

M.

McElroy, Tharsis Sulphur and Copper Company *v.* H. L. (Sc.) 1040
Mackenzie *v.* Bankes H. L. (Sc.) 1324
Macpherson, Urquhart *v.* – P. C. 831
McPherson *v.* Watt – H. L. (Sc.) 254
Matson *v.* Baird – H. L. (Sc.) 1082
Metropolitan Railway Company *v.* Jackson – – H. L. (E.) 193
Middlemiss, Les Sœurs Dames Hospitalières de St. Joseph l'Hôtel-Dieu de Montreal *v.* P. C. 1102
Millar, Roxburghe (Duke of) *v.* H. L. (Sc.) 14
Miller, Rossiter *v.* – H. L. (E.) 1124
Montreal (Ministers and Trustees of St. Andrew's Church), Johnston *v.* – – – P. C. 159
Montreal (Corporation of), Morrison *v.* – – – P. C. 148
———————————— *v.*
Stephens – – – P. C. 605

PAGE

Morrison *v.* Montreal (Corporation of) – – – P. C. 148

N.

New Sombrero Phosphate Company, Erlanger *v.* H. L. (E.) 1218
Nicolls, Burkinshaw *v.* H. L. (E.) 1004

O.

Oriental Bank Corporation, Prince *v.* – – – P. C. 325

P.

Patterson *v.* Gaslight and Coke Company – – H. L. (E.) 239
Perth and Melfort (Earl of) *v.* Elphinstone (Lord) H. L. (Sc.) 297
Platt *v.* Attorney-General of New South Wales – – P. C. 336
Prince *v.* Oriental Bank Corporation – – – – P. C. 325

Q.

Queen Insurance Company, Attorney-General for Quebec *v.* P. C. 1090

R.

Rabbits, Cox *v.* – H. L. (E.) 473
Read *v.* Bailey – H. L. (E.) 94
Reg. *v.* Burah – – P. C. 889
——, Davenport *v.* – – P. C. 115
——, Smith *v.* – – P. C. 614
Richardson *v.* Gray (Baroness) H. L. (Sc.) 1
————, Grice *v.* – P. C. 319
Roberton, Bailey *v.* – H. L. (Sc.) 1055
Ross, Sutherland (Duke of) *v.* H. L. (Sc.) 736
Rossiter *v.* Miller – H. L. (E.) 1124
Roxburghe (Duke of) *v.* Millar H. L. (Sc.) 14

S.

Saffery, Tomkins *v.* H. L. (E.) 213
Shaftoe's Charity, *In re* – P. C. 872
Simpson *v.* Thomson H. L. (Sc.) 279

PAGE

Sinclair, Davidson *v.* H. L. (Sc.) 765
"Singer" Machine Manufacturers *v.* Wilson – – H. L. (E.) 376
Singleton *v.* Tomlinson H. L. (I.) 404
Slattery, Dublin, Wicklow, and Wexford Railway Company *v.* H. L. (I.) 1155
Smith, Chambers *v.* H. L. (Sc.) 795
——— *v.* Great Western Railway Company – H. L. (E.) 165
——— *v.* Reg. – – P. C. 614
Stallybrass, Hood *v.* – P. C. 880
State Line Steamship Company, Steel *v.* – – H. L. (Sc.) 72
Steel *v.* State Line Steamship Company – – H. L. (Sc.) 72
Stephens, Montreal (Corporation of) *v.* – – – – P. C. 605
Sutherland (Duke of) *v.* Ross H. L. (Sc.) 736
Swire *v.* Francis – – P. C. 106

T.

Taylor *v.* Graham – H. L. (Sc.) 1287
Tharsis Sulphur and Copper Company *v.* McElroy – H. L. (Sc.) 1040
Thomson, Dudgeon *v.* H. L. (Sc.) 34
————, Simpson *v.* H. L. (Sc.) 279
Tomkins *v.* Saffery – H. L. (E.) 213
Tomlinson, Singleton *v.* H. L. (I.) 404
Torbain, Edinburgh Street Tramways Company *v.* H. L. (Sc.) 58
Tully, Fisher *v.* – – P. C. 627

U.

Urquhart *v.* Macpherson – P. C. 831

W.

Watt, McPherson *v.* H. L. (Sc.) 254
Webb *v.* Giddy – – P. C. 908
Wilkinson, Armytage *v.* – P. C. 355
Willans *v.* Ayers – – P. C. 133
Wilson, "Singer" Machine Manufacturer *v.* – H. L. (E.) 376

Z.

Zetland (Earl of) *v.* Lord Advocate – – – H. L. (Sc.) 505

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* Middleton	7 H. L. C. 68	410
Adams *v.* Lancashire and Yorkshire Railway Company	Law Rep. 4 C. P. 739	1161
Addie *v.* Western Bank of Scotland	Law Rep. 1 H. L. (Sc.) 165	1278
Agnew *v.* Lord Advocate	11 Macph. (1873) 309	740
Ainsworth *v.* Walmsley	Law Rep. 1 Eq. 518	380
Aitchison *v.* Dixon	Law Rep. 10 Eq. 589	338
Allan *v.* Gott	Law Rep. 7 Ch. 439	412
Allen *v.* Maddock	11 Moo. P. C. 427	408
Amphlett *v.* Parke	2 Russ. & My. 221	409
Andress's Case	8 Ch. D. 126	1008
Anon.	1 Atk. 140	138
Arbuthnott (Viscount) *v.* Scott	4 Paton's App. 337	763
Armstrong *v.* Stokes	Law Rep. 7 Q. B. 598	887
Arnold *v.* Bradbury	Law Rep. 6 Ch. 706	1061
Arnott *v.* Kedder	12 S. 781; 13 S. 619; 1 Rob. App. 183	803
Ash, In the Goods of	1 Deane, 181	408
Ashbury Railway Company *v.* Riche	Law Rep. 7 H. L. 653	1226
Attorney-General *v.* Braybroke	9 H. L. C. 150; 31 L. J. (Ex.) 177	503
——— *v.* Cambridge (Mayor of)	Law Rep. 6 H. L. 303	531
——— *v.* Charlton	1 Ex. D. 204; 2 Ex. D. 398	508
——— *v.* Ettershank	Law Rep. 6 P. C. 354	118
——— *v.* Floyer	9 H. L. C. 477	508
——— *v.* Haberdashers' Company	4 Bro. C. C. 178	410
——— *v.* Sillem	33 L. J. (Ex.) 209	608
——— *v.* Wax Chandlers' Company	Law Rep. 6 H. L. 1	979
Auriol *v.* Thomas	2 T. R. 52	138

B.

Bagg *v.* Montreal (Mayor of)	10 Low. Can. Jur. 136	149
Bagnall *v.* Carlton	6 Ch. D. 371	1224
——— *v.* London and North Western Railway Company	7 H. & N. 423; 1 H. & C. 544	435
Bahia and San Francisco Railway Company, In re	Law Rep. 3 Q. B. 584	1009
Baker *v.* Monk	4 D. J. & S. 388	1226

		PAGE
Baker *v.* Oakes	2 Q. B. D. 171	949
Balderston *v.* Fulton	19 D. 293; 29 Sc. Jur. 493	801
Ball *v.* Harris	8 Sim. 486; 4 My. & Cr. 264	980
—— *v.* Herbert	3 T. R. 253	532
Ballinton *v.* Connor	14 D. 927	586
Bannatyne *v.* Leader	3 My. & Cr. 379	848
Barksdale *v.* Gilleatt	1 Sw. 562	412
Barrett *v.* Barrett	Hetley, 35	714
Barry *v.* Barry	1 Jac. & W. 651	714
Barto *v.* Himrod	4 Seld. N. Y. Rep. 483	897
Barwick *v.* English Joint Stock Bank	Law Rep. 2 Ex. 259	111
Batson, Ex parte	Cooke, Bank. Law, 8th Ed. 530	96
Baxendale *v.* Great Western Railway Company	5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81	1033
Beaudry *v.* Montreal (Mayor of)	11 Moo. P. C. 399	608
Bedford (Duke of) *v.* Trustees of British Museum	2 My. & K. 552	716
Beer *v.* London and Paris Hotel Company	Law Rep. 20 Eq. 412	1128
Bell *v.* Cheape	7 D. 614	1292
—— *v.* Master in Equity	2 App. Cas. 560	360
Berkeley *v.* Swinburne	16 Sim. 275	373
Berry *v.* Usher	11 Ves. 87	410
Betts *v.* Menzies	10 H. L. C. 117	245
Bickett *v.* Morris	Law Rep. 1 H. L., Sc. 47	761
Bilbee *v.* London and Brighton Railway Company	18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182	1161
Billage *v.* Southee	9 Hare, 534	255
Blackburn, Ex parte	Law Rep. 12 Eq. 358	217
Blake, Ex parte	Cooke, Bank. Law, 8th Ed. 528	96
Bloxam *v.* Sanders	4 B. & C. 949	320
Blyth's Case	4 Ch. D. 140	1008
Bonnett *v.* Sadler	14 Ves. 526	712
Bonnewell *v.* Jenkins	8 Ch. D. 70	1128
Bootle *v.* Blundell	1 Mer. 193	409
Boswell *v.* Kilborn	12 Moo. P. C. 467	159
Boughton *v.* Boughton	1 H. L. C. 406	409
——— *v.* Midland Great Western Railway Company of Ireland	7 Ir. Rep. Com. Law, 169	437
Boulton *v.* Jones	2 H. & N. 564	463
Bourdillon *v.* Dalton	1 Esp. 233	844
Boyd *v.* Denny's Trustees	Scottish Law Reporter, vol. xv. p. 21	1293
Bradley *v.* Baxter	15 Barb. N. Y. Rep. 122	897
Bramwell *v.* Halcombe	3 My. & Cr. 737	485
Brewis, In the Goods of	3 Sw. & Tr. 417; 33 L. J. (Prob.) 124	408
Bridge *v.* Grand Junction Railway Company	3 M. & W. 244	1161
Bridges *v.* Longman	24 Beav. 27	118
——— *v.* North London Railway Company	Law Rep. 7 H. L. 213	195, 1161
Broder *v.* Saillard	2 Ch. D. 692	713
Brogden *v.* Metropolitan Railway Company	2 App. Cas. 66	1128
Brook and Delcomyn, Re	16 C. B. (N.S.) 403	615
Brown *v.* Kempton	19 L. J. (C.P.) 169	216
Buccleuch (Duke of) *v.* Hyslop	2 Sc. App. Cas. 43	768
——— *v.* Metropolitan Board of Works	Law Rep. 5 H. L. 423	487
Buchanan *v.* Buchanan	15 Dunl. 7	784

		PAGE
Burges *v.* Wickham	33 L. J. (Q.B.) 28; 3 B. & S. 696	137
Burgess *v.* Burgess	3 D. M. & G. 896	379
Bush *v.* Fox	5 H. L. C. 707	245
Butcher *v.* Stead	Law Rep. 7 H. L. 839	217

C.

Cadham *v.* Horner	18 Ves. 10	629
Calder *v.* Dickson	4 D. 1365	1292
Calvert *v.* Gason	2 Sch. & Lef. 551	713
Campbell *v.* Im Thurn	1 C. P. D. 267	676
Cane *v.* Allen	2 Dow. 294	255
Canham *v.* Berry	15 C. B. 597	639
——— *v.* Jones	2 V. & B. 218	380
Capel *v.* Child	2 Cr. & J. 558	608, 615
Carew's Case	Law Rep. 10 Ch. 308	676
Carlton *v.* Thompson	Law Rep. 1 H. L., Sc. 241	1291
Carnegy *v.* Scott	6 S. 58	768
Carter *v.* Salt	1 Ir. Eq. Rep. 97	979
Castellan *v.* Hobson	Law Rep. 10 Eq. 50	847
Catling *v.* King	5 Ch. D. 660	1128
Catteris *v.* Cowper	4 Taunt. 547	648
Central Railway Company of Venezuela *v.* Kisch	Law Rep. 2 H. L. 99	629
Chad *v.* Tilsed	2 B. & B. 403	650
Chalmers, Ex parte	Law Rep. 8 Ch. 289	320
Chamberlain *v.* West of London Railway Company	2 B. & S. 605	173
Chappell *v.* Davidson	2 K. & J. 123	486
——— *v.* Sheard	2 K. & J. 117	486
Charter *v.* Trevelyan	11 Cl. & F. 714	255
Cheape *v.* Lord Advocate	9 Macph. 377	771
Cheavin *v.* Walker	5 Ch. D. 850	381
Cheeseborough, Ex parte	40 L. J. (Bky.) 79	217
Chinnock *v.* Ely (Marchioness of)	4 D. J. & S. 638	1128
Chitty *v.* Parker	2 Ves. 271	409
Clapham *v.* Shillito	7 Beav. 146	630
Clark *v.* Adie	2 App. Cas. 315; Law Rep. 10 Ch. 667	57
—— *v.* Blything (Hundred of)	2 B. & C. 254	286
—— *v.* Freeman	11 Beav. 112	379
Clarke *v.* Dickson	E. B. & E. 148	838
——— *v.* Dixon	E. B. & E. 148	1278
——— *v.* Hart	6 H. L. C. 633	1283
Clarkson *v.* Woodhouse	3 Doug. 189; 5 T. R. 412, n.	668
Clegg *v.* Edmondson	8 D. M. & G. 789	1226
Clelland *v.* Gray	1 D. 1031	1293
Clementi *v.* Golding	2 Camp. 25; 11 East, 244	486
Clermont *v.* Tasburgh	1 Jac. & W. 119	630
Cliff *v.* Midland Railway Company	Law Rep. 5 Q. B. 258	1161
Clode *v.* Bayley	12 M. & W. 51	327
Clough *v.* London and North Western Railway Company	Law Rep. 7 Ex. 26	628, 1277
Cochrane *v.* Minto (Lord)	6 Paton, 139	1327
Cockle *v.* North Eastern Railway Company	Law Rep. 7 C. P. 321	196, 1161
Colchester (Lord) *v.* Kewney	Law Rep. 1 Ex. 368; Ibid. 2 Ex. 253	476

		PAGE
Cole *v.* Forth	1 Lev. 308; 1 Mod. 94	712
Colonial Bank of Australia *v.* Willan	Law Rep. 5 P. C. 417	117
Colquhoun *v.* Orr-Ewing	2 App. Cas. 839	741
Commins *v.* Scott	Law Rep. 20 Eq. 11	1128
Commissioners of Charitable Donations *v.* Wybrants	2 J. & L. 182	979
Cook *v.* Stationers' Company	3 My. & K. 262	980
Cooper *v.* Phibbs	Law Rep. 2 H. L. 149	916
——— *v.* Wandsworth District Board of Works	32 L. J. (C.P.) 185; 14 C. B. (N.S) 180	608, 615
Copeland *v.* Stephens	1 B. & A. 593	847
Copland *v.* Maxwell	Faculty Collections (1810) vol. xv. 701	739
Coppinger *v.* Gubbins	3 J. & Lat. 397	713
Corby *v.* Hill	4 C. B. (N.S.) 567	1206
Cotton *v.* Wood	8 C. B. (N.S.) 569; 29 L. J. (C.P.) 333	1161
Courtown *v.* Ward	1 Sch. & Lef. 8	714
Cracknell *v.* Thetford (Corporation of)	Law Rep. 4 C. P. 629	436
Crafter *v.* Metropolitan Railway Company	Law Rep. 1 C. P. 300	1161
Croft *v.* Day	7 Beav. 84	379
—— *v.* Lumley	6 H. L. C. 672; 5 E. & B. 648	118
Crossley *v.* Beverley	9 B. & C. 63; 1 Webs. P. R. 112	1061
——— *v.* Maycock	Law Rep. 18 Eq. 180	1128
Cunningham *v.* Cuthbertson	Shaw's Tiend Cases, 175	1304
———— *v.* Taylor	Hume's Decisions, Court of Session, 715	739
Cuthbert *v.* Waldie	2 D. 447	769
Cuvillier *v.* Aylwin	2 Knapp, 72	159

D.

Dallow, In the Goods of	Law Rep. 1 P. & M. 189	408
D'Almaine *v.* Boosey	1 Y. & C. Ex. 288	486
Daloz, The	47 L. J. (P. D. & A.) 1	949
Daniels *v.* Harris	Law Rep. 10 C. P. 1	74
Darcy (Lord) *v.* Askwith	Hob. 234	714
Davenport *v.* Reg.	3 App. Cas. 115	615, 628
Davidson *v.* Case	8 Price, 542; 5 Moo. 116	281
Dawson *v.* Pringle	Fac. Coll. vol. xiv., 195	783
De Burnales *v.* Fuller	14 East, 590, n.	326
De la Rue *v.* Dickenson	Seton on Decrees, 3rd Ed. 911.	44
Dent and Forbes' Case	Law Rep. 8 Ch. 764	1224
De Villiers *v.* Divisional Council of Cape Town	2 App. Cas. 567	914
Devonshire (Duke of) *v.* Barrow Steel Company	2 Q. B. D. 286	935
Dickenson *v.* Teasdale	1 D. J. & S. 52	979
Dillon *v.* Cruise	3 Ir. Eq. Rep. 70	978
Dixon *v.* Dawson	1 S. & S. 327	413
——— *v.* Sadlier	5 M. & W. 405	280
Dobson *v.* Groves	6 Q. B. (N.S.) 637	615
Dodsley *v.* Varley	12 A. & E. 632	321
Doe *v.* Bancks	4 B. & A. 401	129
—— *v.* Bird	6 C. & P. 195	713
—— *v.* Burlington (Earl of)	5 B. & A. 547	714
—— *v.* Hiscocks	5 M. & W. 363	410
—— *v.* Pyke	5 M. & S. 146	173

		PAGE
Dolphin *v.* Robins	7 H. L. C. 390	338
Donald *v.* Suckling	Law Rep. 1 Q. B. 585; 35 L. J. (Q. B.) 237	320
Douglas *v.* Douglas	Law Rep. 12 Eq. 644	338
Dowtie's Case	Yorke on Forfeiture, p. 82	521
Doyle *v.* Falconer	Law Rep. 1 P. C. 328	897
Drinkwater *v.* Goodwin	1 Cowp. 250	887
Drummond *v.* Heritors of Monzie	Mor. Dict. 7920	29
Dumpor's Case	1 Sm. L. C. 41	118
Dunbar (Magistrates of)	8 S. 128	771
Duncan *v.* Adams	22 D. 45	801
Dundee (Magistrates of) *v.* Morris	3 Macq. 134	555
Dunlop *v* Greenlee's Trustees	2 Macph. 1; 3 Ibid. (H.L.) 46.	801
Dunne *v.* English	Law Rep. 18 Eq. 524	255, 1226
Durour *v.* Motteux	1 Ves. Sen. 320	413

E.

Easton *v.* Stirling	M. 1717; 1 Paton, 90	770
Eaton *v.* Jaques	Doug. 461	844
Edelsten *v.* Vick	11 Hare, 78	381
Edis *v.* Bury	6 B. & C. 433	136
Edmondson's Estate, In re	Law Rep. 5 Eq. 389	359
Edwards, In the Goods of	6 Notes of Ecc. Cas. 306	408
——— *v.* Glyn	2 E. & E. 29	217
——— *v.* Meyrick	2 Hare, 70	256
Elbinger Actien-Gesellschafft *v.* Claye	Law Rep. 8 Q. B. 313.	887
Elliot *v.* Lothian	3 S. 248	1301
Elliott *v.* Watkins	1 Jones, Ex. 308	712
Ellis *v.* Great Western Railway Company	Law Rep. 9 C. P. 551	1161, 1209
Evans *v.* Rees	9 C. B. (N.S.) 391; 30 L. J. (C.P.) 16	947
Eyre *v.* M'Dowell	9 H. L. C. 642	801

F.

Falkener *v.* Great Southern and Western of Ireland Railway Company	Ir. Rep. 5 Com. Law, 243	1161
Fawcett *v.* York and North Midland Railway Company	20 L. J. (Q.B.) 222	1083
Feda Hossein's Petition	Ind. Law Rep. 1 Calc. 431	895
Feret *v.* Hill	15 C. B. 207	628
Fergusons *v.* Burnet	Elchie's Decisions (with Morrison's, voce Writ), No. 22	586
Fitch *v.* Weber	6 Hare, 145	410
Fitzgerald *v.* Champneys	2 J. & H. 30; 31 L. J. (Ch.) 777	968
Fletcher *v.* Rylands	Law Rep. 1 Ex. 265; Ibid. 3 H. L. 30	435
Flint *v.* Warren	16 Sim. 124	409
Forbes *v.* Forbes	Kay, 341	338
——— *v.* Marshall	11 Ex. 166	138
——— *v.* Smith	Shaw & D. 602; 1 Wils. & Shaw, App. Cas. 583; 3 Shaw & D. 162	740
Ford *v.* Foster	Law Rep. 7 Ch. 611	381
Fordyce's Case	Cooke, Bank. Law, 8th Ed. 531	96

		PAGE
Foster's Case	11 Rep. 62, b.	965
Fothergill's Case	Law Rep. 8 Ch. 270	1009
Fowle *v.* Freeman	9 Ves. 351	1128
Foxwell *v.* Bostock	10 L. T. (N.S.) 144; 12 W. R. 723; Higgins' Patent Cas. 164	1061
Francis *v.* Grover	5 Hare, 39; 15 L. J. (Ch.) 99.	992
——— *v.* Rucker	Amb. 671	137
Franks *v.* Weaver	10 Beav. 297	380
Fremington School, Re	10 Jur. 512	615
French *v.* Edwards	13 Wallace, 506 (Sup. Court, U. S.)	606
Frith *v.* Barker	2 Johnson's N. Y. Rep. 327	137

G.

Galbraith *v.* Edinburgh and Glasgow Bank	18 Dunl. 470; 31 Jur. 425	590
Galbreath *v.* Armour	4 Bell's App. 374	532
Galloway *v.* London (Corporation of)	Law Rep. 1 H. L. 34	531
——— *v.* Thomson	Morr. 16,805	585
Garnett *v.* McKewan	Law Rep. 8 Ex. 10	327
Gee *v.* Metropolitan Railway Company	Law Rep. 8 Q. B. 161	1161
Gibbins *v.* North Eastern Asylum	11 Beav. 1; 17 L. J. (Ch.) 5	1152
Gibbs *v.* Ougier	12 Ves. 413	410
Gibson *v.* Jeyes	6 Ves. 278	255, 1269
——— *v.* Small	4 H. L. C. 353	74
Gleadall *v.* Thomson	56 New York Rep. 194	74
Glengall *v.* Barnard	1 Keen, 769; 2 H. L. C. 131	1128
Godard *v.* Gray	Law Rep. 6 Q. B. 139.	117
Goodwin *v.* Robarts	1 App. Cas. 476	118
Gordon *v.* Blackburn	M. 10,394	802
Gordon of Park	Morr. 4728; 1 Craigie & Stewart, 562	521
Gore *v.* O'Grady	1 Ir. Rep. C. L. 1	714
Gover's Case	1 Ch. D. 182.	1224
Graham *v.* Peat	1 East, 244	648
Grant *v.* McWilliam	10 Dunlop, 666, n.	739
——— *v.* Officers of Artillery	1 Low. Can. Rep. 91	1111
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	170
——— *v.* Sutton	Law Rep. 4 H. L. 226	1034
Greene *v.* Cole	2 Wms. Saund, 259, n. (11)	713
Gregg *v.* Coates	23 Beav. 33	980
Greville *v.* Browne	7 H. L. C. 689	410
Griffiths *v.* Perry	1 E. & E. 680; 28 L. J. (Q.B.) 204	320
Grill, Ex parte	Cooke, Bank. Law, 8th Ed. 530	96
——— *v.* Iron General Colliery Company	Law Rep. 1 C. P. 612; Ibid. 3 C. P. (Ex.) 476	75

H.

Haldane *v.* Ogilvy	10 Macph. 62	769
Halliday *v.* Holgate	Law Rep. 3 Ex. 299	321
Hallows *v.* Fernie	Law Rep. 3 Ch. 467	1226
Hamilton, In re	3 Austr. Jur. 95	360

		PAGE
Hamilton (Magistrates of)	8 Dunlop, 844	27
Hammersmith Railway Company *v.* Brand	Law Rep. 4 H. L. 171	436
Hammersmith Rent Charge, In re	4 Ex. 87; 19 L. J. (Ex.) 66	608
Hardacre *v.* Nash	5 T. R. 716	413
Hardman *v.* Booth	1 H. & C. 803	461
Hargreaves *v.* Diddams	Law Rep. 10 Q. B. 582	648
Harman *v.* Fishar	Cowp. 117	215
Harris, Ex parte	2 V. & B. 210; 2 Rose, 129	97
——— *v.* Cockermouth Railway Company	3 C. B. (N.S.) 693; 27 L. J. (C.P.) 162	1034
——— *v.* Kemble	1 Sim. 111	630
Harrow School (Governors of) *v.* Alderton	2 B. & P. 86	714
Hartshorn *v.* Slodden	2 B. & P. 282	215
Harvey *v.* Kaye	9 B. & C. 356	136
——— *v.* Shelton	7 Beav. 455	615
——— *v.* Towers	6 Ex. 656	1204
Hawkins *v.* Chappel	1 Atk. 622	412
——— *v.* Gathercole	6 D. M. & G. 1	950
Hay *v.* Perth (Magistrates of)	4 Macq. 535	739
Hele *v.* Bond	Prec. Ch. 474; 1 Eq. Ca. Abr. 342	802
Hemming *v.* Maddick	Law Rep. 7 Ch. 395	848
Hendricks *v.* Franklin	4 Johnson's N. Y. Rep. 119	137
Hensman *v.* Fryer	Law Rep. 3 Ch. 420	409
Heymann *v.* European Central Railway Company	Law Rep. 7 Eq. 154	1224
Hickson *v.* Lombard	Law Rep. 1 H. L. 324	1224
Higgons *v.* Burton	26 L. J. (Ex.) 342	468
Hill *v.* Cock	1 V. & B. 173	409
—— *v.* Evens	4 D. F. & J. 288; 8 Jur. (N.S.) 529	1061
—— *v.* South Staffordshire Railway Company	11 Jur. (N.S.) 192	1042
Hobson *v.* Neale	17 Beav. 185	359
Hodge *v.* Churchyard	16 Sim. 71	979
Holman *v.* Loynes	4 D. M. & G. 281	255
Holmes *v.* North Eastern Railway Company	Law Rep. 4 Ex. 254	1161
Honyman *v.* Marryatt	6 H. L. C. 112	1128
Hood *v.* Barrington	Law Rep. 6 Eq. 218	1128
Hope *v.* Potter	3 K. & J. 206	410
—— *v.* Spears	15 Shaw, 1288	1301
How *v.* Kennett	3 A. & E. 659	847
Hubbersty *v.* Manchester, Sheffield, and Lincolnshire Railway Company	Law Rep. 2 Q. B. 59	848
Hudson *v.* MacRae	4 B. & S. 585	648
Hughes *v.* Kell	2 D. & War. 482	1002
Hunt *v.* Bateman	10 Ir. Eq. Rep. 360	979
——— *v.* Hodges	1 Ir. Jur. 33	713
Hunter *v.* Chalmers	20 D. 1311	1301
——— *v.* Hunter's Trustees	10 D. 922; 20 Sc. Jur. 326	801
Hutcheson *v.* Cassillis	Morr. 14,788; Stair, 316	789
Hutton *v.* Bulloch	Law Rep. 8 Q. B. 331	887
——— *v.* Harper	1 App. Cas. 464	30
Hylton *v.* United States	3 Dallas, 171	1096

I.

		PAGE
Imperial Mercantile Credit Association *v.* Coleman	Law Rep. 6 H. L. 189	1226
Inchiquin *v.* French	Amb. 33	410
Indermaur *v.* Dames	Law Rep. 1 C. P. 272	1161
Inglis *v.* Smith	5 Macph. 320	1318

J.

Jackson *v.* M'Donald	F. C. vol. xiii. 474	770
——— *v.* Marshall	10 Macph. 913	760
——— *v.* Newcastle (Duke of)	3 D. J. & S. 275	714
Jacob's Case	Law Rep. 10 Ch. 211	676
Jacquet *v.* Jacquet	27 Beav. 332	980
James *v.* Great Western Railway Company	Law Rep. 2 C. P. 634, n.	1161
——— *v.* James	Law Rep. 13 Eq. 421	381
Jerrold *v.* Houlston	3 K. & J. 708	487
Jewell *v.* Parr	13 C. B. 916	207, 1171
Johnson *v.* Hall	2 K. & J. 414	713
Johnstone *v.* Coldstream	5 D. 1309; 15 Sc. Jur. 541	801
Jones *v.* Chapman	2 Ex. 803	650
——— *v.* Chappell	Law Rep. 20 Eq. 539	715
——— *v.* Festiniog Railway Company	Law Rep. 3 Q. B. 733	435
——— *v.* Tucker	2 Mer. 533	409

K.

Keith *v.* Burrows	2 App. Cas. 636	292
Kellett *v.* Kellett	1 Ball & B. 533; 3 Dow, 248	409
Kelso, Petr.	12 D. 918	801
Kemp *v.* Sober	1 Sim. (N.S.) 517; 20 L. J. Ch. 602	713
Kennedy *v.* Lee	3 Mer. 441	1128
——— *v.* M'Kinnon	1 S. 198	1318
Kierzkowski *v.* Grand Trunk Railroad of Canada Company	8 Low. Can. Rep. 31	1111
Kilcaldron (Lord) *v.* Balgillo (Lord)	M. 10,372	802
Kinderley *v.* Jervis	22 Beav. 1	801
King *v.* Commissioners of Customs	5 A. & E. 380	360
——— *v.* Withers	Cas. t. Tal. 117	1293
Kingham *v.* Lee	15 Sim. 396	980
Kingsford *v.* Merry	1 H. & N. 503	463
Kinnoull (Lord) *v.* Hunter	Morr. 14,301	739
Kopitoff *v.* Wilson	1 Q. B. D. 377	74

L.

Lamprell *v.* Billericay Union (Guardians) of)	18 L. J. (Ex.) 282	1042
Lancashire and Yorkshire Railway Company *v.* Gidlow	Law Rep. 7 H. L. 517	1034
Lang *v.* Bruce	11 Macph. 377	532
Lawrence *v.* Great Northern Railway Company	16 Q. B. 643	435
Leader *v.* Purday	7 C. B. 4; 18 L. J. (C.P.) 97	486

		PAGE
Leather Cloth Company *v.* American Leather Cloth Company	11 H. L. C. 523	381
Leech *v.* Schweder	Law Rep. 9 Ch. 463	713
Lees *v.* Mackinlay	20 D. 6	1301
Lewis *v.* Anstruther	15 D. 260	801
——— *v.* Hillman	3 H. L. C. 630	255
——— *v.* London, Chatham, and Dover Railway Company	Law Rep. 9 Q. B. 66	1161
Lickbarrow *v.* Mason	1 Sm. L. C. 699	321
Lindsay Petroleum Company *v.* Hurd	Law Rep. 5 P. C. 221	1230
Lloyd *v.* Ingleby	15 M. & W. 465	615
Lodge and Fendal, In re	1 Ves. 166	96
London (City of) *v.* Greyme	Cro. Jac. 182	713
——— *v.* Pugh	4 Bro. P. C. 395	714
London (Mayor of) *v.* Hedger	18 Ves. 355	712
Lord Advocate *v.* Drysdale	Law Rep. 2 H. L., Sc. 369	769
Lover *v.* Davidson	1 C. B. (N.S.) 181	486
Lumley *v.* Wagner	1 D. M. & G. 604	716

M.

McDonald *v.* Longbottom	1 E. & E. 977; 29 L. J. (Q.B.) 256	555
Macdonald *v.* Macdonald	1 Bell's Sc. Ap. 819	298
M'Ewan *v.* Smith	2 H. L. C. 309	321
Mackay *v.* Commercial Bank of New Brunswick	Law Rep. 5 P. C. 412	111
Mackenzie *v.* Lord Advocate	Scottish Rep. 323	783
McKenzie *v.* Whitworth	10 Ex. 142	281
Mackersy *v.* Ramsays	9 Cl. & F. 818	326
McLaren *v.* Menzies	Scotch Cases, 4th Series, vol. iii. 1151	586
McLay *v.* Borland	Scotch Cases, 4th Series, vol. iii. p. 1124	1292
Maddock *v.* Mallett	12 Ir. C. L. Rep. 173	712
Malcolmson *v.* O'Dea	10 H. L. C. 593	650
Malins *v.* Freeman	4 Bing. N. C. 395	118
Mallabar *v.* Mallabar	Cas. t. Tal. 28	412
Marois, In re	15 Moo. P. C. 189	159
Marshall *v.* Martin	Law Rep. 5 Q. B. 239	949
——— *v.* Ulleswater Company	3 B. & S. 732	647
Martin *v.* London, Chatham, and Dover Railway Company	Law Rep. 1 Ch. 501	171
Martin's Trustees *v.* Milliken	3 Macph. 326	1292
Marvin *v.* Wallis	6 E. & B. 726	1128
Mason *v.* Sainsbury	3 Doug. 61	285
Mather *v.* Macbraire	11 Macph. 522 (1873)	741
Mathias, In the Goods of	3 Sw. & Tr. 300; 32 L. J. (Prob.) 115	408
Matthew *v.* Scott	6 D. 718	1292
Maugham *v.* Mason	1 V. & B. 410	409
Maxwell *v.* Hogg	Law Rep. 2 Ch. 307	379
——— *v.* Maclure	6 Jur. (N.S.) 407	339
Megrath *v.* Gray	Law Rep. 9 C. P. 216	676
Melhado *v.* Watson	2 C. P. D. 281	676
Menzies *v.* Macdonald	16 D. 827; 26 Scot. Jur. 385; 2 Macq. 463; 19 D. (H. L.) 1	1327

		PAGE
Merchant Trading Company *v.* Universal Marine Insurance Company	9 Q. B. 596	74
Metropolitan Board of Works *v.* McCarthy	Law Rep. 7 H. L. 243	173
Metropolitan Railway Company *v.* Jackson	3 App. Cas. 193	1161
Meynall *v.* Surtees	3 Sm. & Giff. 101; 25 L. J. (Ch.) 257	1128
Midland Railway Company *v.* Checkley	Law Rep. 4 Eq. 19	171
Miles *v.* Gorton	2 Cr. & M. 504	320
Miller *v.* Miller	9 S. 295	1293
—— *v.* Thompson	3 Man. & G. 576	136
—— *v.* Woodfall	8 E. & B. 493	280
Millington *v.* Fox	3 My. & Cr. 338	379
Milner *v.* Field	5 Ex. 829	117
Mitchell *v.* Mitchell	3 Macph. 721	1293
Moes *v.* Leith and Amsterdam Shipping Company	5 Macph. 988; 39 Scot. Jur. 546	87
Moir *v.* Glen	9 S. 744	771
Mollineux *v.* Powell	3 P. Wms. 268, n. (F)	724
Montesquieu *v.* Sandys	18 Ves. 313	256
Montreal (Mayor of) *v.* Brown	18 Low. Can. Jur. 146; 2 App. Cas. 168	150, 607
Montrose (Magistrates of) *v.* King's College, Aberdeen	2 Dunl. 447, n.	783
Monypenny *v.* Buchan (Earl of)	13 S. 1112	801
Moore, Ex parte	2 Bro. C. C. 597	138
Moorhouse *v.* Lord	10 H. L. C. 286	338
Morgan *v.* Seaward	2 M. & W. 544	245
Morrison *v.* Universal Marine Insurance Company	Law Rep. 8 Ex. 197	628
Murphy *v.* O'Shea	2 J. & Lat. 422	255

N.

Navin (Magistrates of) *v.* Brodie	Moor. 12,779	741
Nelson *v.* Cherrill	8 Bing. 316	648
Newall *v.* Elliott	4 C. B. (N.S.) 269	1061
Nicholson *v.* Great Western Railway Company	5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89	1034
—— *v.* Lancashire and Yorkshire Railway Company	3 H. & C. 534	1161
Nisbit *v.* Lees	7 Macph. 881	1302
North Eastern Railway Company *v.* Wanless	Law Rep. 7 H. L. 12	1161
North of England Insurance Association *v.* Armstrong	Law Rep. 5 Q. B. 244	280
Norway *v.* Rowe	19 Ves. 144	1283

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	1008
Ogilvie *v.* Findlator	Morr. 16,804	586
Oliphant *v.* Smith	M. 1721	770
Overend, Gurney, & Co. *v.* Gibb	Law Rep. 5 H. L. 480	1224

P.

Page *v.* Leapingwell	18 Ves. 463	410
Pagin and Gill's Case	6 Ch. D. 681	1008

		PAGE
Painter *v.* Liverpool Oil Gas Light Company	3 A. & E. 433	608
Parker *v.* Commonwealth	6 Barr. Pennsyl. Rep. 507	897
——— *v.* Framley	1 S. & S. 592	409
——— *v.* McKenna	Law Rep. 10 Ch. 96	1224
Parkes *v.* Stevens	Law Rep. 8 Eq. 358; Ibid. 5 Ch. 36	1061
Parmeter *v.* Attorney-General	1 Dow, 316	650
Parr, Ex parte	18 Ves. 69	136
Parrett Navigation Company *v.* Robins	10 M. & W. 593	436
Parsons *v.* Tinling	2 C. P. D. 119	947
Paterson's Trustees *v.* Hunter	2 Macph. 240; 36 Scotch Jur. 115	1302
Paton (Creditors of)	Morr. 16,807	586
Peacock, Ex parte	Law Rep. 8 Ch. 682	675
Pease *v.* Gloahec	Law Rep. 1 P. C. 219	463
Peck *v.* North Staffordshire Railway Company	10 H. L. C. 473	1128
Penn *v.* Bibby	Law Rep. 2 Ch. 127	1061
Pennant's Case	3 Rep. 64, a	131
Petersen *v.* M'Lean	6 Macph. 218	1318
Phillips' Charity, Re	9 Jur. 959	615
Phillips *v.* Clark	2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168	87
——— *v.* Phillips	1 My. & K. 649	409
Pike *v.* Nicholas	Law Rep. 5 Ch. 251	488
Pinbury *v.* Elkin	1 P. Wms. 563	1292
Planché *v.* Braham	4 Bing. N. C. 17	485
Polhill *v.* Walter	3 B. & Ad. 114	1202
Pollard *v.* Bank of England	Law Rep. 6 Q. B. 653	326
——— *v.* Clayton	1 K. & J. 462	1226
Poole *v.* Bott	11 Hare, 33	373
Porter *v.* Kirkus	Law Rep. 2 C. P. 590	847
Potter *v.* Duffield	Law Rep. 18 Eq. 4	1128
Prendergast *v.* Turton	1 Y. & C. C. 98	1226
Preston *v.* Edinburgh (Magistrates of)	8 Macph. 502	1302
Proud *v.* Proud	32 Beav. 234	980

Q.

Queensberry (Duke of) *v.* Annandale (Marquis of)	Morr. 14,279	740
Quihampton *v.* Going	24 W. R. 915	411

R.

Radley *v.* London and North-Western Railway Company	1 App. Cas. 754	1161
Raggett *v.* Findlater	Law Rep. 17 Eq. 29	381
Ramsay's Trustees	Scotch Cases, 4th Series, vol. iv. p. 243	1293
Randal *v.* Cochran	1 Ves. Sen. 97	280
Ransome *v.* Eastern Counties Railway Company	1 C. B. (N.S.) 437; 26 L. J. (C.P.) 91	1033
Reade *v.* Conquest	11 C. B. (N.S.) 479	500
Readhead *v.* Midland Railway Company	Law Rep. 4 Q. B. 379	86
Reed *v.* Jackson	1 East, 357	649

		PAGE
Reg. *v.* Bolton	1 Q. B. 66	117
—— *v.* Burah	3 App. Cas. 889	916
—— *v.* Canterbury (Archbishop of)	1 E. & E. 545	615
—— *v.* Cheshire Lines Committee	Law Rep. 8 Q. B. 344	608
—— *v.* Lords of the Treasury	Law Rep. 7 Q. B. 387	360
—— *v.* Meares	14 R. & R. 106	895
—— *v.* Middleton	Law Rep. 2 C. C. R. 38	462
—— *v.* Norwich (Mayor of)	1 B. & A. 310	606
—— *v.* Price	Law Rep. 6 Q. B. 418	367
—— *v.* Reay	7 Bomb. H. C. R. Cr. Cas. 77	895
—— *v.* Rochester (Mayor of)	7 E. & B. 91	606
—— *v.* Saddlers' Company	32 L. J. (Q.B.) 337	628
Reid *v.* Williamson	5 D. 644	1301, 1302
Rex *v.* Pease	4 B. & Ad. 30	435, 1088
—— *v.* Poole	K. B. Cas. t. Hardw. 28	1186
—— *v.* Pugh	Doug. 188	968
Rhodes *v.* Rudge	1 Sim. 79	410
Ricket *v.* Metropolitan Railway Company	Law Rep. 2 H. L. 175	173
Rider *v.* Wombwell	Law Rep. 4 Ex. 32	1161
Ridgway *v.* Wharton	6 H. L. C. 238	1128
Roberts *v.* Davey	4 B. & Ad. 664	129
——— *v.* Walker	1 Russ. & My. 752	409
Robertson *v.* Duff	2 Dunlop, 279	555
Robinson *v.* Bland	2 Burr. 1077	136
Robson *v.* North-Eastern Railway Company	2 Q. B. D. 85	195
Rodgers *v.* Nowill	5 C. B. 109; 17 L. J. (C.P.) 52	379
Rogers *v.* Allen	1 Camp. 309	649
Roll *v.* Osborn	Hob. 22	650
Rose *v.* North-Eastern Railway Company	2 Ex. D. 248	195
Rothschild *v.* Brookman	2 Dow. & Cl. 188	1226
Ryder *v.* Wombwell	Law Rep. 4 Ex. 38	207

S.

Sale *v.* Lambert	Law Rep. 18 Eq. 1	1128
Saltoun's (Lord) Case	3 Macq. 659; 21 Dunlop, 124	507
Saunders *v.* Smith	3 My. & Cr. 711	488
Schwan, The	Law Rep. 4 A. & E. 187	949
Scott *v.* Edmond	12 D. 1077	1301
—— *v.* Liverpool (Corporation of)	3 De G. & J. 334	616
—— *v.* Napier	7 Macph. (H. L.) 35	1327, 1329
Seixo *v.* Provezende	Law Rep. 1 Ch. 192	380
Sheffield Nickel and Silver Plating Company *v.* Unwin	2 Q. B. D. 214	628
Shepherd *v.* Innes	Morr. 16,818	585
Shuttleworth *v.* Le Fleming	19 C. B. 687; 34 L. J. (C.P.) 309	648
Sillitoe, Ex parte	1 Gly. & J. 374	97
Simpson *v.* Holliday	13 W. R. 577; Law Rep. 1 H. L. 315	1061
——— *v.* Ingham	2 B. & C. 65	327
——— *v.* King's College, Aberdeen	F. C. vol. xv. 296	769
Siner *v.* Great Western Railway Company	Law Rep. 2 Ex. 150; Ibid. 4 Ex. 117	195, 1161
Singer Company *v.* Kimball	11 Macph. 267 [11 Court of Sess. Cas. 3rd Series]	379

		PAGE
Skelton *v.* Cole	1 De G. & J. 287	1129
——— *v.* London and North-Western Railway Co.	Law Rep. 2 C. P. 631	1161
Skingley, Re	2 Mac. & G. 221	980
Skinner *v.* McDouall	2 De G. & Sm. 265; 17 L. J. (Ch.) 347	1128
Smart *v.* Prujean	6 Ves. 560	410
Smith, Ex parte	1 Gly. & J. 74; 6 Madd. 2	100
——— *v.* Braine	16 Q. B. 244	1204
——— *v.* Crawford	4 Shaw, 738	27
——— *v.* Innes	17 D. 778	801
——— *v.* Kay	7 H. L. C. 750	255
——— *v.* Timms	1 H. & C. 849	216
——— *v.* Webster	3 Ch. D. 49	1128
Smyth *v.* Carter	18 Beav. 78	714
Southern *v.* How	Poph. 146	379
Spargo's Case	Law Rep. 8 Ch. 407	1008
Sprots *v.* Heriots' Hospital	7 S. & D. 682	1304
Stair *v.* Stair	5 S. & D. 449; 2 W. & S. 614	803
Stallhard *v.* Lee	3 B. & S. 364	117
Stanton *v.* Richardson	Law Rep. 7 C. P. 431; Ibid. 9 C. P. 390	74
Stapley *v.* London and Brighton Railway Company	Law Rep. 1 Ex. 21	1161
Stead *v.* Williams	7 Man. & G. 818	245
Stephenson *v.* Heathcote	1 Eden, 38	409
Steuart *v.* Seafield (Earl of)	Scotch Cas., 4th Series, vol. iii. 518	1302
Stevenson *v.* Spiers' Trustees	20 D. 651	1301
Stewart *v.* Greenock Marine Insurance Company	2 H. L. C. 159; 1 Macq. 328	281
Stewart *v.* M'Cullum	8 Macph. (H.L.) 1	1302
——— *v.* Montrose (Duke of)	1 Macph. (H.L) 25; 35 Scotch Jur. 420; 4 Macq. 499	1302
Stirling *v.* Ewart	4 Dunlop, 684	508
Stradling *v.* Morgan	Plowd. 204	952
Strick *v.* Swansea Coal Company	16 C. B. (N.S.) 245; 33 L. J. (C.P.) 240	1033
Stubley *v.* London and North Western Railway Company	Law Rep. 1 Ex. 13	1161
Sullivan *v.* Walker	14 Ir. C. L. Rep. 460	1161
Suse *v.* Pompe	8 C. B. (N.S.) 538	137
Swift *v.* Winterbotham	Law Rep. 8 Q. B. 244	111
Sym *v.* Donaldson	Morr. 16,713	586

T.

Tate *v.* Williamson	Law Rep. 1 Eq. 527; Ibid. 2 Ch. 55	255
Taylor *v.* Frobisher	5 De G. & Sm. 191	359
——— *v.* Montreal (Mayor of)	18 Low. Can. Jur. 210	152
——— *v.* Taylor	3 D. M. & G. 190	409
——— *v.* Whitehead	2 Doug. 745	437
Tempest, Ex parte	Law Rep. 6 Ch. 70	216
Tench *v.* Cheese	6 D. M. & G. 463	410
Theed *v.* Debenham	2 Ch. D. 165	713
Thomas *v.* Brown	1 Q. B. D. 714	1129
——— *v.* Dering	1 Keen, 729	1128

		PAGE
Thomas *v.* Welch	Law Rep. 1 C. P. 192.	1061
Thompson *v.* McCrummen's Trustees	18 Dunlop, 470	587
Thomson *v.* Eastwood	2 App. Cas. 212	980
Thorne *v.* Cramer	15 Barb. N. Y. Rep. 115	897
Thorpe, In re	Law Rep. 8 Ch. 743	676
Thurlow *v.* Commonwealth of Massachusetts.	5 Howard's Rep. 504	1096
Tipping *v.* Eckersley	2 K. & J. 264	713
Tooney *v.* London and Brighton Railway Company	3 C. B. (N.S.) 146; 27 L. J. (C.P.) 39	1161
Topham, Ex parte	Law Rep. 8 Ch. 614	216
Towler *v.* Chatterton	6 Bing. 258	586
Townley *v.* Crump	4 A. & E. 58	320
Townsend's Case	Plowd. 112	966
Trappes *v.* Meredith	10 Macph. 38; 44 Sc. Jur. 25.	801
Trotter *v.* Hume	Morr. Dict. 12,798	744
Trudgin's Case.	11 Rep. 63; Co. Lit. 130, a.	968
Turner *v.* Liverpool Docks Company	6 Ex. 543; 20 L. J. (Ex.) 394	320
——— *v.* Nicholls	16 Sim. 565	848
——— *v.* Richardson	7 East, 335	844, 848
Tyrrwhitt *v.* Wynne	2 B. & A. 554	650

U.

Udny *v.* Udny	Law Rep. 1 H. L., Sc. 441	338
Umbers *v.* Jaggard	Law Rep. 9 Eq. 200	359
Urquhart *v.* Urquhart	1 Macq. 736	590

V.

Valpy *v.* Oakeley	16 Q. B. 941; 20 L. J. (Q.B.) 380	321
Van Casteel *v.* Booker	2 Ex. 691	216
Veasey *v.* Malcolm's Trustees	Scotch Cases, 4th Series, vol ii. [2 Rettie], p. 748	586
Vigers *v.* Pike	8 Cl. & F. 562	1224

W.

Wadsworth *v.* Smith	Law Rep. 6 Q. B. 332	616
Walker *v.* Bartlett	25 L. J. (C.P.) 263	847
——— *v.* Frobisher	6 Ves. 70	615
Wallis *v.* South-Western Railway Company	Law Rep. 5 Ex. 62	1033
Warrington *v.* Furbor	8 East, 242	359
Warwick *v.* Rogers	6 Man. & G. 340	327
Waterhouse *v.* Jamieson	Law Rep. 2 H. L. Sc. 29	1008
Waterpark *v.* Fennell	7 H. L. C. 650	650
Watkins, In the Goods of	Law Rep. 1 P. & M. 19	408
Watson *v.* Marjoribanks	15 S. 586	1293
——— *v.* Saul	1 Giff. 188	979
Watts *v.* Porter	3 E. & B. 743	801
Weatherstone *v.* Tweedale (Marquis of)	12 S. 1	769
Weeks *v.* Sparkes	1 M. & S. 679	649
Welch *v.* Knott	4 K. & J. 747	392
Weld *v.* Gas Light Company	1 Stark. 189	435
Weller *v.* Ker	Law Rep. 1 H. L., Sc. 11; 4 Macph. (H.L.) 8; 38 Sc. Jur. 256	801

		PAGE
Wenman *v.* Mackenzie	5 E. & B. 447	649
Wheeler and Wilson Company *v.* Shakespear	39 L. J. (Ch.) 36	381
Whicker *v.* Hume	7 H. L. C. 124	338
White *v.* Buccleuch (Duke of)	Law Rep. 1 H. L., Sc. 70	533
——— *v.* Hunt	Law Rep. 6 Ex. 32	847
Whittington *v.* Boxall	5 Q. B. 139	648
Whitworth's Case	3 Hare, 416; 1 Ph. 728	801
Wickham *v.* New Brunswick and Canada Railway Company	Law Rep. 1 P. C. 75	801
Wilkins *v.* Fry	1 Mer. 265	848
Wilkinson *v.* Fairrie	1 H. & C. 633	1161
Williams *v.* Everett	14 East, 582	326
——— *v.* Groucott	4 B. & S. 149	436
Willsmore's Will, In re	2 Vict. L. R. Insol. & Prob. Cas. 30	360
Wilson *v.* Day	2 Burr. 827	215
——— *v.* Musselburgh (Magistrates of)	6 Macph. 483; 40 Scot. Jur. 250	1304
Windus *v.* Windus	6 D. M. & G. 549	409
Winn *v.* Bull	7 Ch. D. 29	1129
Woodland *v.* Fear	7 E. & B. 519; 26 L. J. (Q.B.) 202	327
Woodruff *v.* Merchants' Bank of New York	25 Wendell, 673	137
Woolcock *v.* Den	1 F. & F. 537	713
Worrall *v.* Jacob	3 Mer. 256	802
Wotherspoon *v.* Currie	Law Rep. 5 H. L. 508	379
Wright *v.* North Western Railway Company	1 Q. B. D. 252	1161
——— *v.* Wilkin	2 B. & S. 232	980
Wyatt *v.* Great Western Railway Company	6 B. & S. 709	1161, 1196

Y.

Yates *v.* Whyte	4 Bing. N. C. 272	284
Yonge, Ex parte	3 V. & B. 31; 2 Rose, 40	97
Young *v.* Fernie	4 Giff. 577; Law Rep. 1 H. L. 63	1061
——— *v.* Robertson	4 Macq. 314	1292

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (Sc.)
1877
June 29.

SIR JOHN STEWART RICHARDSON, BART. APPELLANT;
BARONESS GRAY *et al.* . . . . . RESPONDENTS.

MRS. FLEMING AND HER HUSBAND . . APPELLANTS;
BARONESS GRAY *et al.* . . . . . RESPONDENTS.

Salmon Fishings—User—Prescriptive Possession.

Case in which the House *held*, affirming the judgment of the Court of Session, that the Baroness *Gray* had the sole and exclusive right of salmon fishing in the *Tay ex adverso* of the *Meadow Pows* of *Inchyra*, in *Perthshire*.

Where a piece of land on the banks of a tidal river is exchanged, the right of salmon fishing therein being expressly reserved, a grant in 1873 of that salmon fishing, though from the Crown, will not deprive the prior owner of his right.

IN February, 1874, the Baroness *Gray*, of *Gray* and *Kinfauns*, commenced an action in the Court of Session against Sir *John*

247

H. L. (Sc.)
1877

SIR JOHN S. RICHARDSON
v.
BARONESS GRAY.

FLEMING
v.
BARONESS GRAY.

Stewart Richardson, Baronet, and against Mrs. *Fleming* and her husband, to have it declared that "the Pursuer had the sole and exclusive right to the salmon fishings in the River *Tay ex adverso* of a certain piece of ground called the *Meadow Pows* of *Inchyra*;" and praying that the Defenders should be interdicted from interfering with her Ladyship in the "peaceable enjoyment of her said exclusive right."

The main defence of Sir *John Stewart Richardson* was, that, by virtue of the title to his own lands, he had the sole and exclusive right to the whole fishings claimed by the Baroness. He also relied upon a Crown grant obtained by him in 1873 from Her Majesty's Commissioners of Woods and Forests.

Mrs. *Fleming* and her husband contended that the Baroness *Gray's* claim was excluded by the negative and positive prescription; and they asserted that their own claim was supported by "immemorial possession" and by the statute of 1617, c. 12.

On the 11th of January, 1876, the First Division of the Court of Session pronounced judgment in favour of the Baroness *Gray*, with the following declarator:—

> Find and declare that the Pursuer (Baroness *Gray*) has the sole and exclusive right of salmon fishing in the River *Tay ex adverso* of that piece of ground formerly called the *Meadow Pows* of *Inchyra*, which lies westward of the stone indicated by the letter C. on the plan. To this extent repel the defences. Find that neither of the Defenders have any right of salmon fishing *ex adverso* of the said piece of ground, and interdict them accordingly, and decern with expenses.

Against this judgment Sir *John Stewart Richardson* appealed to the House, having for his counsel, Mr. *John Pearson*, Q.C., and Mr. *Badenoch Nicolson* (of the Scotch Bar).

Mrs. *Fleming* and her husband also appealed to the House, having for their counsel, Mr. *Southgate*, Q.C., and Mr. *Cotton*, Q.C.

The Lord Advocate (1), Mr. *E. E. Kay*, Q.C., and Mr. *Robert Johnstone* (of the Scotch Bar), appeared for the Baroness *Gray*.

The question was governed by verbal and documentary evidence, set out at great length in the prints, extending to upwards of 600 quarto pages. The case, however, on the merits is most fully and ably stated in the 4th Series of the Court of Session Reports (2).

(1) The Rt. Hon. *W. Watson*. (2) Vol. iii. p. 1031.

H. L. (Sc.)
1877
SIR JOHN S. RICHARDSON
v.
BARONESS GRAY.
FLEMING
v.
BARONESS GRAY.

After hearing the copious argument of counsel, on the 17th, 19th, 20th, 23rd, and 24th of April, the Law Peers, on the 29th of June, 1877, delivered the following opinions:—

THE LORD CHANCELLOR (1):—

My Lords, in this case, at the close of the very elaborate argument, your Lordships did not, I think, entertain any doubt that the judgment of the Court of Session, which was an unanimous judgment in favour of the Respondent, ought to be affirmed. The case was one of considerable intricacy and minuteness in regard to the details of the title and the evidence of user under that title. I have been prepared to express to your Lordships my own opinion; but having had the advantage of reading the observations which your Lordships will hear presently from my noble and learned friend on my left (2), I have thought it better simply to state to your Lordships that I shall move that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN (3):—

My Lords, the questions raised are as to the right of salmon fishing *ex adverso* of a piece of land on the north side of the *Tay*. Some operations, commenced in 1807 and completed in 1826, have turned what at the beginning of this century was part of the *alveus* of the *Tay* into dry land, and altered the configuration of the shore of the *Tay* there.

The summons of the 17th of February, 1874, asks for a declaration that Lady *Gray* has

> The sole and exclusive right of salmon fishing *ex adverso* of that piece of land formerly called the *Meadow Pows* or *Powlands* of *Inchyra*,

or, in the alternative, that she has

> The sole and exclusive right to the salmon fishings in the River *Tay ex adverso* of the westmost portion of the said piece of ground formerly called the *Meadow Pows* or *Powlands* of *Inchyra*, extending 120 yards or thereby, extending eastwards from the march between the said piece of ground (now part of the lands of *Cairnie*) and the lands of *Inchyra*.

(1) Lord *Cairns*.
(2) Lord *Blackburn*.
(3) This opinion was revised by his Lordship in print.

H. L. (Sc.)
1877
SIR JOHN S. RICHARDSON
v.
BARONESS GRAY.
FLEMING
v.
BARONESS GRAY.

and she asks that her right should be found and declared accordingly; and that Sir *John Richardson* and Mrs. *Fleming* respectively should be interdicted from interfering with her right so found.

The First Division, by their interlocutor, which altered that of the Lord Ordinary, find and declare that the Pursuer has the sole and exclusive right of salmon fishing in the River *Tay ex adverso* of that piece of land called the *Pows* which lies to the westward of the stone indicated by the letter C. on the Ordnance Map.

This gives Lady *Gray* part of what she asked for, but not the whole. She has not appealed, and consequently your Lordships have only to inquire whether Lady *Gray* has got too much; no question being raised before this House as to whether or not she has got too little.

One main point raised by the appeal of Mrs. *Fleming* is that she, Mrs. *Fleming*, is solely entitled to the salmon fishing *ex adverso* of that piece of land marked Q. C. on the map. If this is made out, Lady *Gray's* right is negatived, and Sir *John Richardson* will have the benefit of it; but Sir *John Richardson's* ground of appeal is that he is solely and exclusively entitled to the salmon fishings *ex adverso* of the *locus in quo*, as against both Lady *Gray* and Mrs. *Fleming*.

It is more convenient to dispose of this last contention first. Sir *John* has the lands of *Cairnie*, which included the island of *Cairnie*, by an old title. The earliest title-deed which he produces is the charter of confirmation by the Earl of *Rothes* to *John Hay* of *Pitfour* in 1706. That charter comprises the lands of

Cairdny una cum piscariis salmonum aliorumque piscium in aqua de Tay usitat. et consuet. ad predict. terras pertinen.

He has also a modern grant in 1873 from the Commissioners of Her Majesty's Woods and Forests of the salmon fishings *ex adverso* the frontage of what was formerly called *Pow Meadows*. But this modern grant contains an express stipulation (which would be implied if not expressed) that it shall in no way prejudice the right of any person who can produce a valid and effectual title prior in point of time.

The Pursuer Lady *Gray* and Mrs. *Fleming* (who on this part of the case make common cause) produce a Crown Charter of 1647 to

Sir *Thomas Blair*, comprising much property, and containing this clause:

*Ac totas et integras terras de Inchirref cum molendino earundem terris molendinarijis multuris et sequelis soli*t *et consue*t *cum piscarijs salmonum et alijs piscarijs dic*t *terrarum de Inchirref.*

This was followed by infeftment. And they shew by a series of documents that this title to the salmon fishings of the whole lands of *Inchyra* which had belonged to Sir *Thomas Blair* has now passed to Lady *Gray* and Mrs. *Fleming*. Whether it is vested in them *pro indiviso*, as tenants in common, or in separate lots, and what lots belong to each of them respectively, are questions: but there is no question that Sir *Thomas Blair* is their author, and that they have between them got the title to the salmon fishings of *Inchyra* such as Sir *Thomas* had therein.

Sir *John Richardson* and his authors have always fished the fishings of *Cairnie*, but he has wholly failed to shew any such user of the fishing *ex adverso* of the *locus in quo* as would extend his fishing of *Cairnie* so as to include it.

The question on this first appeal is therefore reduced to this, whether the *Powlands* were part of the lands of *Inchyra* at the date of the Crown Charter of 1647. If not, the modern grant of 1873 gives Sir *John* a title to the salmon fishing. If it was part of *Inchyra*, that modern grant is inoperative.

As to this, it seems as clearly made out as any such thing possibly can be, that until a decreet arbitral executed in April, 1745, the lands, then called the *Powlands of Inchyra*, were held by *Margaret Blair*, by marriage Lady *Gray*, who was the author of *Margaret* Lady *Gray*, the present Pursuer, as the eastermost kavil of the lands of *Inchyra*. The laboured lands of *Inchyra* were at that time certainly occupied severally by *Margaret Blair*, Lady *Gray*, and by the authors of Mrs. *Fleming* in alternate kavils (whether as in title joint owners, though occupying in severalty, is a question in the second appeal).

The decreet arbitral to which I have referred was made by virtue of a submission between the said Lady *Gray* and *James Hay* of *Pitfour* (the author of Sir *John Richardson*) for the purpose of straightening marches. It was under it that the lairds of *Pitfour* first acquired the *Powlands*, long after they had

H. L. (Sc.)
1877
SIR JOHN S. RICHARDSON v. BARONESS GRAY.
FLEMING v. BARONESS GRAY.

acquired *Cairnie* and the salmon fishings thereof. And though under this decreet they acquired and have ever since held the lands of *Powlands*, there was nothing to give them any title to the salmon fishing *ex adverso* the *Powlands*, which remained in title as before, and there has been no possession proved which could extend any other title of *Pitfour* so as to embrace those fishings.

My Lords, I think it very clear that Sir *John Richardson* has failed in shewing any title to himself in this fishing.

The questions raised by the other appeal are different. One depends on the true construction and effect of the titles by which it is shewn that the title to the salmon fishing, which had as an undivided whole belonged to Sir *Thomas Blair*, became vested in the Pursuer and Mrs. *Fleming*, and the effect upon this of the various contracts and documents given in proof. The latest in point of date, and the most important, is a decreet arbitral dated in November, 1795, between *William* Lord *Gray* and *John Anderson*, Esquire, the author of the Respondent Mrs. *Fleming*. The Pursuer Lady *Gray* claims as heiress of entail in possession under a tailzie granted by this *William* Lord *Gray* in 1796, after the date of that decreet arbitral.

The part of this decreet arbitral relating to the salmon fishings is as follows:

> We find that the lowest or easternmost fishing belongs to Lord *Gray*, and is altogether opposite to the lands of *Pitfour*, being bounded to the west by the old march stone between the lands of *Pitfour* and *Inchyra*, which we ordered to be marked number one. That the several fishings between the stones number one and number two, numbers three and four, numbers seven and eight, numbers nine and ten, numbers eleven and twelve, numbers thirteen and fourteen, and numbers fifteen and sixteen, being seven in number, do all belong to the said *John Anderson*. The stone number sixteen stands in the march between the lands of *Inchyra* and *Ribney*. That the several fishings between the stones numbers two and three, numbers four and five, numbers six and seven, numbers eight and nine, numbers ten and eleven, numbers twelve and thirteen, numbers fourteen and fifteen, being also seven in number (besides the fishing opposite to the estate of *Pitfour*), do all belong to Lord *Gray*, and that the fishing between the stones number five and six, called *Hurle Carle*, is the joint property of Lord *Gray* and Mr. *Anderson*; and in terms of the said submission we do hereby declare that the said fishings respectively belonging to each of the said parties shall not be hurt or affected by the division now made of the lands, but that the said fishings shall be enjoyed and possessed according to the rights, custom, and usages heretofore observed by the said parties, their authors and predecessors.

My Lords, had *William* Lord *Gray* in 1796 raised a summons

against Mr. *Anderson*, the author of Mrs. *Fleming*, to the same effect as that now raised by Lady *Gray* in 1874, there could at that time have been no difficulty in applying this description to the land, and determining what was meant both by "the lowest or easternmost fishing, which is altogether opposite to the lands of *Pitfour*," which the arbiters declare to belong to Lord *Gray*, and what was "the old march stone between the lands of *Pitfour* and *Inchyra*," which they ordered to be marked No. 1, as the west boundary of that fishing. Unfortunately, nearly eighty years have been allowed to elapse, and there is a controversy of fact as to both these questions. There is no dispute that during all that period Mrs. *Fleming* and her authors have possessed, as a separate possession, the fishing called "the *Hen*," and that it is the fishing described in the decreet arbitral as the fishing between the stones numbered 1 and 2; and that Lady *Gray* and her predecessors have during all that time possessed as a several fishing that called "the *Glove*," and that it is the fishery described as that between the stones numbered 2 and 3. The controversy which must be determined by the evidence is, what is the eastern boundary of the *Hen* fishing.

Lady *Gray* contended that "the lowest or eastermost fishing, altogether opposite the lands of *Pitfour*," was the fishing *ad adverso* the *Powlands*, beginning at the point marked Q. on the Ordnance Map, and continuing down till it met the *Cairnie* fishings on the east. And that the march stone which the arbiters ordered to be marked 1 is a fifth stone lying in the same line with the four bound-stones, marked on the Ordnance Map as B.S., but which, being covered with silt, was not seen by those who made the Ordnance Survey, and is not marked on the map. It is, however, clearly proved that such a stone lies nearly at the spot marked Q., and has on one side of it what may either be a Roman 1 or a capital I.

The contention on behalf of Mrs. *Fleming* was that the bound-stone which was ordered to be marked 1 was an old stone standing at the point A., which stone has on the west side of it a letter I., and on the east side a letter P., and that the easternmost fishing belonging to Lord *Gray* must have been the fishing below that stone A., principally in the strait between *Cairnie Island* and

H. L. (Sc.) 1877

SIR JOHN S. RICHARDSON v. BARONESS GRAY.

FLEMING v. BARONESS GRAY

the north bank of the *Tay* (where the right to fish would be almost illusory), but possibly embracing some space of open water above the westmost point of *Cairnie Island*. The Pursuer's theory was that this stone at A. was never a bound-stone between the lands of *Pitfour* and *Inchyra;* but that it had at some unknown period, probably before the excambie which joined the *Powland* to *Pitfour*, been put up as a fishing bound-stone to indicate the line of division between the fishings of *Inchyra* and *Pitfour*. On this question of fact the Lord Ordinary found entirely in favour of Lady *Gray*, and all the four Judges in the First Division agreed with him. I should not lightly differ on a question of fact from the Judge who tried the cause and saw the witnesses give their evidence. I have, however, examined the evidence for myself. It would be tedious, and I do not think it would answer any good purpose, to discuss it in detail; but I am bound to add that if I had had to decide this case in the first instance on the evidence before us, I should have come to the same conclusion as the Court below. And such I believe was the opinion of every noble and learned Lord who heard the argument.

It was not alleged that Lady *Gray* or her predecessors had at any time subsequent to 1794 actually fished between the eastern boundary of the *Hen* and the western boundary of the *Pitfour* fishings. And it was contended on behalf of Mrs. *Fleming* that for forty years and upwards she and her authors had fished, as part of the *Hen* fishery, *ex adverso* the land as far eastwards as the line A., B., C. And, consequently, it was contended on her behalf, that whatever might have been the boundary in 1794, the *Hen* fishery had been by prescription extended down to the point C.

The Lord Ordinary found that such user was not established in fact, and all four Judges in the First Division agreed with him. Lord *Mure* expressed a doubt whether (if it had been proved in fact) Mrs. *Fleming* could have availed herself of it to extend her boundary beyond that fixed by the deed on which she was obliged to found to shew that she had a divided fishery at all, but as in the opinion of all the Judges the defence failed in fact, it was unnecessary for him and it is unnecessary for your Lordships, if you agree as to the fact, to form an opinion on this point of law.

My Lords, at your Lordships' Bar the counsel discussed the

evidence on this question minutely. I think it was sufficiently shewn that from the time when some alterations were made by the Commissioners for the Navigation of the *Tay*, and the stones and gravel were removed, and the fishing which had before that time been from cairns, was carried on from the shore, the tenants of the *Hen* fishery had fished down to the point C.; but that alteration was in 1843, about thirty or thirty-one years and not more before the raising of the summons. During the earlier period which would be required to make up the forty years, viz., between the years 1834 and 1843, the fishing was, it is agreed, from cairns, now removed. Very many old witnesses were called by all three parties to prove from memory what the then position of the cairns was, and, as every person conversant with such inquiries would anticipate, there was much discrepancy between them. The counsel for Mrs. *Fleming* was able to read the testimony of several witnesses, which, taken alone, would have established her case; it would have been strange if he had not been able to do so. The counsel for Lady *Gray* was able to read the testimony of several witnesses, which, taken alone, would have established the contrary. On such a conflict of testimony the finding of the Judge who saw the witnesses and their demeanour ought to have great weight. Forming my judgment independently, I come to the same conclusion as he did, on the ground stated by Lord *Deas*, where he says:

> "To have the effect contended for, the proof of possession would require by our" (Scotch) "law to be clear and unequivocal for the complete period of forty years; I think it is not proved to be so."

If it were necessary I should find as a fact that at least in the period before 1838, when the cairn was put back nearer to the high-water mark, the tenants of the *Hen* had no possession of the fishing to the eastward of the old boundary; it is, however, unnecessary to go further than to say that no possession by them before that time is proved. To that extent, at least, I have no doubt that the evidence in favour of the finding of the Lord Ordinary preponderates. And I believe that such was the opinion of each of the noble and learned Lords who heard the argument.

My Lords, on all these points the whole five Judges below were agreed, and the result I have come to is, that their conclusions

H. L. (Sc.) 1877 SIR JOHN S. RICHARDSON v. BARONESS GRAY. — FLEMING v. BARONESS GRAY.

were right. I now come to one question on which they did not altogether agree. The Lord Ordinary found by his interlocutor that the Pursuer Lady *Gray* and the Defender Mrs. *Fleming* were infeft in the lands and in the fishery *pro indiviso*, and therefore assoilzied the Defender Mrs. *Fleming* from the conclusions of this action, reserving right to the Pursuer to institute such other action as she might be advised.

This interlocutor was recalled by the First Division. The whole four Judges agreed in this result. It is perhaps not accurate to say that they differed from the Lord Ordinary's opinion, for it appears from Lord *Deas*' judgment that the Lord Ordinary founded his opinion on different materials from those before the First Division. However that may be, after a learned, and in an antiquarian view a very interesting discussion on the now antiquated system of runrig and rundale, and a minute examination of the various proofs and documents, all four Judges agreed in the result that the proof justified a declaration against both Appellants that Lady *Gray* has the sole and exclusive right of salmon fishing in the river *Tay ex adverso* of the land in question. They do not, however, arrive at this result in quite the same way.

The original grants under which the previously undivided estate of *Inchyra* and the salmon fishings thereof were in the year 1655 first divided into a just and equal sunny half conveyed to the author of Lady *Gray*, and two quarters conveyed to the authors of Mrs. *Fleming*, were followed by infeftment. They contained a description of the premises in words which have been learnedly discussed in the judgments below. That description has been substantially repeated in the feudal titles down to the time of the raising of this summons.

Lord *Deas* and Lord *Mure*, if I understand them aright, think that the language of the original title was ambiguously expressed, and that though "the just and equal half of the fishings of *Inchyra*" *primâ facie* meant an undivided half of the fishings of the whole of *Inchyra*, it might mean the fishings of those several parts of the lands of *Inchyra* which together make the half of the lands, and which several parts of the land were from the beginning conveyed in severalty, and that there was enough shewn in this case to justify the Court in coming to the conclusion that the title

to the fishings *ab initio* was a several title. Lord *Ardmillan* and the Lord President did not think that the language of the title as to the salmon fishings was ambiguous; but, if I understand them aright, they thought it was proved that long before the deed of 1794 the owners of this originally undivided salmon fishing had by some agreement (the evidence of which, if it was ever formally drawn up, was lost) divided the fishings, and that in 1794 *William* Lord *Gray* and Mr. *Anderson*, who were then competent to do what they liked with the fishings, did, by the deed of submission and the decreet founded on it, ratify and confirm the previous agreement to divide the fishings and make that division binding in future. And the possession for seventy-nine years having been conformable to this deed, and both Lady *Gray* and Mrs. *Fleming* in their pleadings founding on the deed and affirming that the right was several, this was sufficient as between these two parties to warrant the declaration. As to a technical objection that might, on this last view, have been raised by Sir *John Richardson*, viz., that he could not be sued by Lady *Gray* until after she had established her several title against Mrs. *Fleming*, the Lord President points out in the first place that no such objection was raised by Sir *John Richardson* on the record, and in the next place gives reasons for holding that it could not have availed him if timeously and competently raised.

My Lords, it may in some other case be important to decide which of these lines of argument is the right one. In the present case it is not important; and seeing that both Lady *Gray* and Mrs. *Fleming* have in the pleadings founded their case on the ground that the *Hen* fishing was a several fishing, which is the result at which all the four Judges arrive, I think that your Lordships may well affirm that result, without expressing any opinion as to which of the lines of argument is the right one.

The conclusion at which I have thus arrived is that the interlocutor appealed against should be affirmed, and both appeals dismissed with costs.

LORD O'HAGAN:—

My Lords, I shall follow the example of my noble and learned friend on the woolsack, and abstain from an idle repetition of the

H. L. (Sc.) 1877

SIR JOHN S. RICHARDSON v. BARONESS GRAY.

FLEMING v. BARONESS GRAY.

facts and arguments which have been so lucidly stated in the opinion which, with him, I have had the advantage of perusing.

Concurring with that opinion in all particulars, I only desire to say that, whilst both the appeals appear to me untenable, I entertain that conclusion with different degrees of confidence as to each of them. I have no doubt that Sir *John Richardson* has failed to establish his title. The grant of 1873 expressly saves all antecedent rights; and it is overborne and nullified by the charter of 1647, conveying the territory of *Inchyra* with the salmon fishings belonging to it, and the series of dealings which vested the subject-matters of that grant in Lady *Gray* and Mrs. *Fleming*. The lands to which Sir *John Richardson* has shewn himself entitled give him no claim to the *ex adverso* fishings; and all the evidence he has offered fails to affect the force of the charter and the unbroken possession which has followed it. On the first appeal, therefore, I think the right of the Respondents perfectly clear.

I am by no means so thoroughly satisfied as to the second appeal. It involves the consideration of a mass of evidence, oral and documentary, as to boundaries and march stones, which refers to times long past and transactions shrouded in much obscurity. But on the whole I think it sufficiently sustains the view taken, after most careful consideration, by the Lord Ordinary and all the learned Judges of the Court of Session. And your Lordships, even if the effect of it were more doubtful than it is, would be slow to differ from a tribunal which had the great advantage, necessarily denied to us, of seeing the witnesses and estimating the value of their testimony with reference at once to their integrity, their means of knowledge, and their accuracy of observation. It seems to me that the user for forty years on which the Appellants were obliged to rely was not established, and that there is no sufficient reason for disturbing the well-considered judgments of the Courts below. I am, therefore, of opinion that in both cases the appeals should be dismissed with costs.

LORD GORDON:—

Your Lordships have paid careful attention to the arguments which have been submitted on behalf of the Appellants in these

appeals, which involve some important principles in regard to ancient titles and also some difficult questions of fact depending upon conflicting evidence. As your Lordships have come to an unanimous judgment in support of the interlocutors pronounced by the First Division of the Court of Session, I am glad that my vote will not be required for the decision of the appeals, as I happened to have been counsel for Sir *John Richardson*, in a previous appeal at his instance, against the *Flemings*, from a judgment of the Court of Session in 1871, involving to some extent the same questions which arise under the present appeals; and a noble and learned Lord who was also counsel for Sir *John Richardson* in that appeal thought it was better he should not take part in the proceedings in your Lordships' House in the present appeals. But as the questions involved are peculiarly in regard to Scotch title and law, I have given careful attention to the proceedings in the appeals and the arguments of counsel; and having had an opportunity of perusing and considering the opinion of Lord *Blackburn*, I think it right to express my concurrence in the result at which he has arrived.

The interlocutors complained of affirmed, and the appeals dismissed with costs.

Agents for the Appellants: *Connell, Hope, & Spens*, and *Andrew Beveridge.*

Agents for the Respondents: *Grahames & Wardlaw.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1877 June 29.

THE DUKE OF ROXBURGHE *et al.* . . APPELLANTS;

MILLAR . . . . . RESPONDENT, *Ex parte* (1).

Allocation of Area and Seats in a new Church.

If specific legal rights have been previously established, these will be duly regarded and preserved in the new allocation of area and seats.

Effect on Heritors disjoined Quoad Sacra.

The heritors of a parish disjoined *quoad sacra* are to be regarded as still retaining their original civil rights, and continuing still subject to their original civil liabilities, notwithstanding the disjunction.

IN 1868 it became necessary to repair a portion of the nave of the ancient Abbey of *Jedburgh*, which from the establishment of Presbytery in *Scotland* had been used as the church of the parish. The Marquis of *Lothian*, however, volunteered to erect a new parish church on a separate piece of land to the satisfaction of the heritors, and to convey it to them on condition that they would convey to him the nave of the abbey; his Lordship, as proprietor of the abbey, being anxious to restore it architecturally to its original state. The offer was accepted; and a formal agreement to that effect was entered into. In November, 1874, when the new church had been completed, a deed of excambion (2) was executed whereby the new church was conveyed to the Committee of the *Jedburgh* Heritors in exchange for and in lieu of the old church; but there was no provision made as to the allocation of the area and seats.

The parish of *Jedburgh* consists of a landward district and a royal burgh. Part of the landward district has been disjoined and erected, with parts of other parishes, into a *quoad sacra* parish, called the parish of *Edgerston;* and the main question in the present case was whether in apportioning the area and seats in the new church the Appellants, as heritors of the disjoined lands, were still to be considered as heritors of the parish of *Jedburgh.*

(1) No appearance for Mr. *Millar.*

(2) To exchange or barter: *Jamieson,* Scotch Dict., vol. i.; *Erskine,* Prins. Scotch Law, p. 139.

On the 30th of April, 1875, the Sheriff of *Roxburgh* decided that "in apportioning the area and sittings, the heritors of the lands disjoined and erected into the parish of *Edgerston quoad sacra*, were not to be considered as heritors of the parish of *Jedburgh*." Against this judgment an appeal was taken to the First Division of the Court of Session (1), who, with the aid of Lord *Neaves*, Lord *Ormidale*, and Lord *Gifford*, on the 2nd of June, 1876, refused the application, Lord *Deas* and Lord *Mure* dissenting from the decision.

The appeal to the House was by the Duke of *Roxburghe*, the Marquis of *Lothian*, the Countess of *Home*, and *William Oliver Rutherfurd*, Esq., heritors of the lands disjoined *quoad sacra*, praying a reversal of the decision of the Court of Session.

The *Lord Advocate* (2) and Mr. *Asher* (of the Scotch Bar), appeared for the Appellants. The case was heard *ex parte*. The authorities cited are fully examined in the opinion of Lord *Gordon* (3). The parties called as Respondents "not having lodged a printed case in answer to the appeal, though ordered so to do." The Appellants' Counsel maintained that the erection of a parish *quoad sacra* did not affect the civil rights and liabilities of the heritors. The circumstance that their lands were transferred *quoad sacra* to the parish of *Edgerston* did not relieve the Appellants from the liability imposed upon them by law, to contribute to the maintenance and reparation of the parish church of *Jedburgh*, and therefore ought not to deprive them of their right to sittings in that church. The effect of the contract was to give to the whole heritors of *Jedburgh*, including the Appellants, rights in the new church equivalent to those they had enjoyed in the old.

The following opinions were delivered by the Law Peers :—

THE LORD CHANCELLOR (4) :—

My Lords, the question in this appeal is as to the propriety of two interlocutors dated the 30th of April, 1875, and the 2nd of June, 1876. By the second of these interlocutors the First

(1) Scotch Cases, 4th Series, vol. iii., p. 728.
(2) Rt. Hon. *W. Watson*.
(3) *Infra*, p. 25.
(4) Lord *Cairns*.

H. L. (Sc.) 1877 DUKE OF ROXBURGHE v. MILLAR.

Division of the Court of Session (1) confirmed the former interlocutor, which had been made by the Sheriff; and by this former interlocutor the Sheriff had found that in the division and apportionment of the area and seatings of the new parish church of *Jedburgh* the heritors of certain lands disjoined from that parish and erected into the parish of *Edgerston quoad sacra* were not to be considered as heritors of the parish of *Jedburgh*.

Until the year 1874 the parish church of *Jedburgh* was in the old abbey of *Jedburgh*. The area and seatings had long previously been divided and apportioned between the heritors of the parish of *Jedburgh* and the provost and magistrates of *Jedburgh*. In 1855 part of the lands of the parish of *Jedburgh* were disjoined and erected *quoad sacra* into the parish of *Edgerston;* but no alteration or re-arrangement of the division and apportionment of the area and sittings being at that time made, or being competent, the church continued to be, as it had been before, the property of the heritors according to the former division, a property which they of course held for the benefit of the parishioners.

Up to a certain point there does not appear to be any difference of opinion between the learned Judges of the Court of Session. The Judges agreed that if a new church had become necessary, and had been built at the expense of whatever heritors were liable to build it, any heritor would have been entitled to apply to the Sheriff to have the area of the new church divided among whatever heritors had at the time by law the right to that area. On the other hand, the learned Judges appear to agree that if the nature of the work done was merely an extension of the old church, or repairs of the old church, there would not be this right to a division or apportionment *de novo;* and they further appear to agree that if one church were to be exchanged for another church then already built, a thing which must in practice be of rare occurrence, the area of the church taken in exchange would fall to be divided in the same way as the area of the church given in exchange had been divided and enjoyed.

It is necessary to consider with accuracy the facts of this case, with a view to determine the precise character of what was done as to the old *Jedburgh* church.

(1) Scotch Cases, 4th Series, vol. iii., p. 728.

In the year 1868 the church wanted repairs; various estimates were given as to these repairs, beginning with the sum of £900, which was said to be sufficient to repair the church without increasing the number of sittings, and rising to £4500, as sittings might be increased or other work done. In this state of things the late Marquis of *Lothian*, the owner of *Jedburgh Abbey*, and of the property on which it stood, and himself one of the heritors of the parish, entered into an agreement with the heritors, with the consent of the presbytery, to build a parish church for the parish on a site to be acquired by him to the satisfaction of the heritors and of the presbytery, and to enter into a contract of excambion, by which Lord *Lothian* should convey to the heritors the new church, to be held as the parish church of *Jedburgh*, and the heritors should convey to Lord *Lothian* the old parish church and the materials of it.

This agreement was carried into execution. The plans of the church were approved, the ground was procured, and the church was built, and a deed termed a contract of excambion was executed between the present Lord *Lothian*, as the successor of his father, and the committee of the heritors of the parish. It is quite clear that this committee were appointed by and represented all the heritors of the parish of *Jedburgh*, as well those whose lands had been disjoined *quoad sacra* as those whose lands were not so disjoined. The deed is dated the 25th of November, 1874; by it Lord *Lothian* conveys to himself and the committee of heritors, as trustees for the heritors of the parish, the new church and the ground on which it was erected, and in consideration thereof the committee of the heritors, as representing all the heritors, convey to Lord *Lothian* the old parish church and the materials, with liberty to remove the materials; preserving, however, the abbey as a ruin, and giving access to the public, and undertaking not to apply it to any ecclesiastical purpose.

It appears to me that this transaction is neither more nor less than a substitution, to all intents and purposes, by Lord *Lothian* with the consent of the heritors, of the new church in the place of and in exchange for the old, and that the transaction and its effect are correctly described in the resolution of the committee of heritors

H. L. (Sc.) 1877

DUKE OF ROXBURGHE v. MILLAR.

passed on the 22nd of December following the date of the last deed, which was in these words:

The meeting, after hearing Mr. *Millar's* report as to Sheriff *Pattison's* difficulties regarding the apportionment of sittings in the new church to the portion of *Jedburgh* parish attached to *Edgerston quoad sacra* church, are unanimously of opinion that the excambion would not be carried out as originally intended if that portion of the parish be not allowed sittings in the new parish church in the same manner as in the church in the abbey.

It is an unfortunate circumstance that in this appeal your Lordships have not had the assistance of the argument of any Respondent. The judgment of the Sheriff does not appear to have been pronounced on the application of any heritors having an interest to exclude the Appellants; and before the Court of Session no heritor appeared to support the judgment of the Sheriff. At the same time, a question of very great and general interest appears to have been raised in the Court below, namely, whether heritors who are the owners of lands disjoined *quoad sacra* continue liable to rebuild the parish church of their original parish. The Sheriff appears to have held that the heritors of disjoined lands would be no longer liable to rebuild the old parish church. The Lord President, Lord *Neaves*, Lord *Ormidale*, and Lord *Gifford*, treat this point as one which it is unnecessary to decide. Lord *Deas* considers that the heritors of the disjoined lands would continue liable. Lord *Deas* and Lord *Mure*, however, considered that in this case there was no ground for a new division and apportionment, inasmuch as Lord *Lothian* had merely substituted a new church to be held in all respects *in statu quo ante* of the old parish church. As Lord *Deas* says, the question did not and could not arise as to what would have been the respective liabilities and rights of parties if a new church had been required to be erected at the expense of the heritors.

My Lords, I concur in the opinion of Lord *Deas* and Lord *Mure*. Whenever a case arises of a new parish church being built by assessment in a parish where a part of the lands have been disjoined *quoad sacra*, it will have to be decided among what heritors the area is to be divided, and the Court will in that case have the advantage of knowing in the first place, that which cannot be immaterial, upon what heritors the assessment for the new church has fallen. That question, in my opinion, does not arise in the present case.

On the whole, I have to advise your Lordships that the interlocutors should be reversed so far as appealed against, and that this House should declare that after setting aside seats for the ministers and elders and for the beadle and the poor, the division and apportionment of the seats in the parish church at *Jedburgh* recently erected ought, so far as the circumstances of the case will admit, to follow and be regulated by the division and apportionment thereof in the former parish church for which the new parish church was substituted by way of exchange.

LORD HATHERLEY:—

My Lords, I must express my opinion upon this case with great diffidence. We have not had the advantage of hearing the case argued on both sides; we have only had the advantage, a great advantage undoubtedly it has been, of knowing the opinions of those learned Judges who are very competent to form them, and who took different views upon the same subject when the case was heard before, I think, seven Judges in *Scotland*. Besides that, I have had the advantage, through the kindness of my noble and learned friend on my left (Lord *Gordon*) of seeing the opinion he is about to deliver in this case.

I confess, my Lords, it appears to me, upon the whole, that the argument is in favour of holding the decision come to by the Sheriff and the decision come to by the majority of the Court in *Scotland* to be erroneous. It seems almost to be conceded that if the church had been simply restored and repaired *in situ*, on the spot on which it stood, no question would have arisen on the subject. Having regard to all the circumstances of the excambion, and the arrangement then made by Lord *Lothian*, I think it would be unreasonable, under the circumstances, to hold that there was any change worked in the rights of those who were entitled to any rights, whatever they may have been, in the previous building when the church was simply transferred to a new site. It was in reality intended, as it appears to me by that instrument, to be transferred in such a manner that all those who had any rights or interests therein should immediately succeed to the same rights and interests in the new parish church.

I do not speak, my Lords, with any confidence upon a question

H. L. (Sc.) 1877 DUKE OF ROXBURGHE v. MILLAR.

turning upon this peculiar species of law. I only accede, according to the best judgment I can form, to the views which have been urged, not only in the argument at your Lordships' Bar, but by those of the learned Judges who differed from the majority in the Court below, those being also the views which are taken by those of your Lordships who are most competent to form an opinion upon the case as having skill in this particular branch of the law.

LORD O'HAGAN:—

My Lords, in this case we have not the guidance of any authority in the Scottish law. The very learned and elaborate argument of the Lord Advocate failed to furnish any. Neither have we any proved practice in the legal or ecclesiastical arrangements of *Scotland* which we might follow safely. The circumstances with which we have to deal are peculiar and abnormal, so far as your Lordships are informed, and do not seem to have antecedents in the past on which to found an authoritative usage. Nor, finally, is there anything in the documents which can be vouched to determine the novel point arising now apparently for the first time. The parties to this exchange did not anticipate the difficulty, and failed to provide for it, as they might have done, by using express words, and we can only gather, from their general relations to each other and the facts out of which the excambion grew, the purposes which they entertained and the rights they meant to establish. In this state of things the embarrassment of decision is increased by the conflicting judgments of the learned Judges of the Court of Session.

Looking, however, to the reasoning on behalf of the Appellants, which unfortunately is here, as it was in the Court below, *ex parte*, and ascertaining as well as I can the intentions of the parties from the terms of the instrument of excambion, I have reached the conclusion that the views adopted by Lord *Deas* and Lord *Mure* are entitled to the approval of your Lordships.

The parishioners of *Jedburgh* accepted the offer of Lord *Lothian*, and agreed to abandon to him the ancient church, then needing repairs, which they were bound to make, and to receive in lieu of it another as commodious for the purposes of public worship, and

subject to no necessity of burdening the parish with outlay of any kind. There is nothing in the transaction or the documents which explain it, indicating that the new church was not to be, to all intents and purposes, a substitute for the old, or that any rights which had attached to the seatholders in the latter should not equally belong to them when the substitution took place. Such rights the Appellants unquestionably had. They were ancient rights and well established—some of them personal and some of them held in trust. They agreed to the excambion, which they might have resisted, but there is no pretence of proof that they ever thought of compromising those rights or consented to anything beyond the exercise of them in another building, at another place. How can we impose a condition which was unknown when the bargain was made? If on the day when Lord *Lothian* got possession the Appellants were entitled to sittings, how did they lose their title to equivalent accommodation in the substituted church? Or how did the accident of their interest in the *quoad sacra* parish work a forfeiture of their claim to privileges legally vested in them and never surrendered? There was no abandonment of those privileges by contract, and we have heard of no law which would destroy them *in invitum*.

This is substantially, I think, the view of the dissentient Judges of the Court of Session. It commends itself to me as most in accordance with such evidence as is before us; and with such light as we can gain from an *ex parte* discussion, as well as with the reason of the thing. I am glad to know that it has the assent of one of my noble and learned friends who has had the opportunity of forming a closer acquaintance with Scotch law and practice than can belong to the majority of your Lordships. His very satisfactory opinion I have had the opportunity of perusing, and it dispenses with further detail of the reasons on which it is sustained.

I concur in thinking that it would be inconvenient and hazardous to express an opinion on points not essential to be determined in this case, in which we have only heard a one-sided argument; and therefore advisedly abstain from offering any opinion as to the principles on which sittings should be allocated to individual heritors in Scottish churches, or as to the extent and nature of

H. L. (Sc.) 1877 DUKE OF ROXBURGHE v. MILLAR.

their interest in those sittings; or as to their continuing liabilities when their properties or parts of their properties may be brought within the bounds of a *quoad sacra* parish. These may be important public questions, and should be decided on contentious discussion and full consideration, which they could not receive from your Lordships in this case. I am of opinion, with great deference to the majority of the Court of Session, and such hesitation as must be suggested by their great authority and by the nature of the *ex parte* argument before your Lordships, that the judgment of the Court of Session should be reversed.

LORD BLACKBURN (1):—

My Lords, it seems to me that it is not desirable to decide on this an *ex parte* appeal more than is absolutely necessary. And I take a view of the effect of the excambion which renders it unnecessary to express any opinion on the other points discussed in the Court below.

I take it that the rights and duties of the heritors of a parish in *Scotland* are not the same with reference to an old parish church repaired and with reference to a new parish church erected *de novo*.

The 17 & 18 Vict. c. 91, s. 33, enacts that parochial assessments are in future to be made on the real rent,

> Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents as appearing upon the present valuation rolls, all assessments for the repair thereof shall be imposed according to such valued rent.

This enactment seems to me to imply that the old allocation shall continue so long as the church is merely repaired. If the church was destroyed by fire, or otherwise it became the duty of the heritors to provide a new one, the assessment would be according to the real rent, and a new allocation would seem to be just; whether it would be required by law or not I do not say.

In the present case, the old parish church of *Jedburgh* was not in such a state as to make it necessary to do more than repair it; and consequently, if the heritors had proceeded to do all that they were bound to do and no more, no new allocation would have been

(1) Revised by his Lordship in print.

required, except in so far as any changes in the arrangements in the church would render it requisite to have a new arrangement as to the way in which the old possessory rights should in future be enjoyed.

I do not think it necessary to form an opinion on the question whether, on the severance of a part of the old parish *quoad sacra* without any alteration in the fabric of the old parish church, it would have been competent to any one to require a new allocation. If that could be done at all, it would seem that it could not be done by such a proceeding as the present, under which it was only competent to regulate the possessory rights, not to take away those existing.

If, in the supposed case of the old parish church being repaired, those heritors whose lands lie exclusively in the *quoad sacra* parish of *Edgerston* had wished to raise the question whether they were liable to the repairs of the old parish church they must necessarily have given up their claim to the old allocation; but if they were either compelled by law, or without suit were willing, to pay their share of the assessment to the repairs, I see no reason why they should not do so, and keep their old allocation.

The very special circumstances of this case seem to me to raise the question whether the new church erected by the Marquis of *Lothian* is to be considered as given by him in lieu of the old church, such as the heritors were bound to make it, *i.e.*, thoroughly repaired, and subject to all parties continuing to possess rights equivalent to those which they had possessed under the old allocation; or whether the new church is to be considered as given in lieu of a new church which the heritors were not bound to erect, but which if they had erected it would probably have been subject to a new allocation, in which latter case the novel and important points discussed in the Courts below and at the Bar must be decided.

Lord *Deas*, in the Court below, dissents partly on the effect of the excambion.

Lord *Mure* bases his dissent from the judgment below exclusively on the effect of the excambion.

The majority of the Court below have not bestowed so much attention on this point as I think it deserves. They seem to have

H. E. (Sc.) 1877

DUKE OF ROXBURGHE v. MILLAR

thought that, as there could be no doubt that what Lord *Lothian* built was a new church, it followed necessarily that everything was to be the same as in the case of a new church built by the heritors, and that the special circumstances made no difference. That, in short, in legal effect, Lord *Lothian* is necessarily to be taken as building a new church as agent for the heritors.

This I think does not follow in point of law. Lord *Lothian* and the heritors might, with the assent of the presbytery, have agreed that the new church should be occupied as the old one was, or they might have agreed that there should be a new allocation, and if they had by apt words expressed either intention in the excambion, I see no reason why that intention should not have effect.

Unluckily it appears not to have occurred to any one that any such question could arise till the meeting of the heritors on the 22nd of December, 1874, and the excambion, which had been executed in November, 1874, contains no express provision on the subject, all that is said being that the new church was "to be held as the parish church of *Jedburgh* in all time thereafter," which is quite consistent with either the old allocation being applied to the new church or a new allocation being made.

But on looking at the extraneous facts, I think it sufficiently appears that the new church was to be given in lieu of the old church as it then was, or, at most, in lieu of what it would be when repaired, which would be subject to the old allocation; and not as a new church built by the heritors, who, as far as appears, had no intention voluntarily to incur the heavy expense of building a new church which they were not bound in law to do. The reports of the architects are made entirely with reference to repairing the old church, not as to building a new one. And the presbytery, on the 6th of October, 1868, in giving their assent to the proposed scheme, stipulate that the size of the new church should be such as to contain a number of sittings not less than those contained in the present church, which the presbytery understand to be 1200. This was a very proper stipulation if the church was to be considered as in lieu of the repaired church. They make no reference whatever to the number of the inhabitants of the parish, which would have been the proper subject for consideration

if a church was to be erected *de novo;* and in fact it appears that whether the inhabitants of the portion of the parish now disjoined *quoad sacra* be included or excluded in reckoning the examinable inhabitants (1), the number for which accommodation ought, according to the usual rule, to have been provided for if it were a church erected *de novo* considerably exceeds 1200.

It is useless to look for authorities on this question. Such liberality as Lord *Lothian's* is rare, and no question such as this has ever arisen before. It must be decided as a case of the first impression; and with every respect for the able Judges who formed the majority in the Court of Session, I think they have not given sufficient attention to the special circumstances of this case.

I prefer to say nothing on the general question, as it is unnecessary for the decision of the case. And the above view of the effect of the excambion is sufficient to justify a reversal of the decision below, and the declarator and judgment proposed.

LORD GORDON (2):—

My Lords, the Appellants in this appeal are the Duke of *Roxburghe,* the Marquis of *Lothian,* the Countess of *Home* (who, I regret to say, has died since the cause was heard, but her husband, the Earl of *Home,* was also a party for his interest, and may still be held to represent the interests of the deceased Countess in virtue of his right of courtesy), and Mr. *Rutherfurd* of *Edgerston,* who are designated as being "all heritors of the parish of *Jedburgh.*"

The circumstances out of which the appeal arises are these:—

In the year 1855 a portion of the parish of *Jedburgh,* along with portions of other adjoining parishes, were disjoined *quoad sacra* from their respective parishes, and erected into a parish *quoad sacra,* under the provisions of an Act passed in 1844 (7 & 8 Vict. c. 44), which received the name of *Edgerston.* All the present Appellants are proprietors of lands in this disjoined portion of the parish of *Jedburgh,* so erected into the *quoad sacra*

(1) *i.e.,* parishioners above twelve years of age.—Parochial Ecclesiastical Law of *Scotland,* p. 198.

(2) Revised by his Lordship in print.

H. L. (Sc.) 1877

DUKE OF ROXBURGHE v. MILLAR.

parish of *Edgerston;* but the Appellants, the Marquis of *Lothian* and the Countess of *Home,* are also proprietors of other lands in the parish of *Jedburgh,* which were not disjoined from the parish of *Jedburgh.*

For many years, down to the year 1874, the parish church of *Jedburgh* consisted of a portion of the old abbey of *Jedburgh.* Sittings in the church were, about eighty years ago, allocated to the then heritors of that parish, and amongst others to the predecessors of the present Appellants. There seems to be no doubt that the allocation then made was in all respects regular, and that the predecessors of the Appellants were legally entitled to the sittings which were allocated to them. These sittings were retained, and were possessed by the Appellants and their predecessors, as pertinents of their several properties, down to the time when the old parish church was excambed for the new church to be immediately referred to.

In the year 1868 it was found that the old church of *Jedburgh* required very considerable repairs, and the heritors obtained a report on the subject by architects with a view to having the necessary repairs executed. It is of some importance to observe, that the heritors did not then contemplate the erection of a *new* church, but only the repair of the existing one. The abbey of *Jedburgh,* in so far as not occupied as the parish church, belonged to the late Marquis of *Lothian,* and it occurred to his Lordship that it would be desirable to remove the old parish church, which, in its then state, interfered with the beauty of the ruins of the abbey; and he proposed to the heritors that if they would convey to him the old church, and all their rights therein, he would erect a new church on another site, and convey it to the heritors in lieu of the old one. This proposal was acceded to by the heritors of *Jedburgh,* with consent of the presbytery of the bounds as the ecclesiastical guardians of the parish, and was carried into effect. The then Marquis of *Lothian* died a few years after, but his successor, the present Marquis, erected at his own cost a suitable new church; and thereupon a contract of excambion was entered into, by which his Lordship on the one hand conveyed to the heritors the new church; and on the other hand, "in consideration" thereof, the heritors conveyed to the Marquis the old

church, and all their rights therein. The contract of excambion is before the House, but I do not consider it necessary to read it in detail to your Lordships.

The heritors having thus acquired the new church, which as already explained was not built at their expense, took into consideration the allocation of the sittings therein amongst those entitled thereto. It does not appear to have been necessary that judicial proceedings should have been instituted for that purpose. The sittings in the old church had been allocated by voluntary arrangement among the heritors and others entitled to sittings in the year 1793; and in 1834 there was, in like manner by voluntary arrangement, a partial re-arrangement of the sittings—and it was quite competent to allocate the sittings in the new church acquired by the excambion by the same means. But instead of proceeding in this manner, the heritors presented a petition to the Sheriff of the county praying him to proceed with the division of the area or seating of the church amongst the heritors of the parish in terms of law. This petition, as being a proceeding for the regulation of possessory rights, was undoubtedly competent. But I think that the Sheriff had not power under it to deprive those who had legal possession of sittings in the old church of any share in the allocation of sittings in the new. I think the two cases of *Smith* and the *Magistrates of Hamilton*, referred to by the Sheriff in the note to his interlocutor, shew that, as Mr. *Duncan* expresses it in his work on Parochial Law, p. 201:

> When the result of a division, if made, would be to invert a long continued possession of sittings, then the proper form in which to investigate and determine an adverse claim, and the right of adverse possession, is not by way of petition to the Sheriff, but of summons, it may be of declarator simply, or of reduction and declarator combined.

In *Smith* v. *Crawford* (1) the Lord Ordinary (Lord *Eldin*) held

> That the application to the Sheriff to invert the possession after the long possession that had followed on the division of the church was incompetent.

And this judgment was confirmed by the Inner House. And in the case of the *Magistrates of Hamilton* (2) Lord *Medwyn* said (p. 854) that the long possession of a gallery by the magistrates

> Gives them a right to occupy this position in the present church till at least

(1) 22 June, 1826, 4 Shaw, 738. (2) 23 June, 1846, 8 Dunlop, 844.

H. L. (Sc.) 1877

DUKE OF ROXBURGHE v. MILLAR.

they are dispossessed by a much more formal process than a petition to the Sheriff to divide the area of the existing church on account of its being new seated.

In the course of the proceedings before the Sheriff in the present case, a question was raised, whether those heritors whose lands were disjoined *quoad sacra* from the parish of *Jedburgh*, and now formed part of the *quoad sacra* parish of *Edgerston*, were entitled in the division to a proportion of the area of the church and sittings corresponding to the valuation of the lands so disjoined from *Jedburgh*, and forming part of the *quoad sacra* parish. The Sheriff held

That in so far as regards the dividing and apportioning of the area and seatings of the new parish church of *Jedburgh*, recently erected, the heritors of the lands so disjointed and erected into the parish of *Edgerston, quoad sacra*, are not to be considered as heritors of the parish of *Jedburgh*.

And that the sittings—

Fall to be allocated and divided among the other heritors of the parish (excluding as aforesaid) according to their valuations as appearing in the valuation rolls.

The Court of Session affirmed the Sheriff's judgment; and your Lordships are now called on to decide whether the Sheriff and the Court of Session were right in the judgments so pronounced.

There seems to have been much discussion before the Sheriff and in the Court of Session, and there was also a learned argument before your Lordships' House, on the general question whether heritors in the position of the Appellants, who were proprietor of lands which had been disjoined *quoad sacra* from one parish and erected into a parish *quoad sacra*, remained liable for the expense of repairing or re-erecting the parish church of the original parish, and were entitled to a proportion of the sittings therein. But it occurs to me that the decision of this question is not necessary to the decision of the point before your Lordships; and further, that in an *ex parte* case such as the present (for as such the cause was treated by the Court of Session, and also at your Lordships' Bar, there being no party at your Lordships' Bar to resist the appeal), it would not be right to decide a question of so much importance. I therefore suggest that it is not advisable to express any opinion whatever on that question.

I may, however, remark that the judgment of the Sheriff was

founded upon the decision of the case of *Drummond* v. *The Heritors of Monzie, Monadie, Crieff, and Others* (1), in 1793, in which the Sheriff held it to have been decided

That the heritors of lands annexed *quoad sacra* are not liable to contribute for upholding the fabric of the parish kirks from which they are disjoined.

But the Judges of the Court of Session, who had carefully examined the proceedings in that case, were of opinion that it was not properly reported, and was inapplicable as an authority in the present case.

There was another point discussed at the Bar of your Lordships' House, viz., that on which the Lord President and some of the other Judges in the Court below rest their opinions. His Lordship held that the allocation to heritors of sittings in a parish church is not an allocation for their own behoof, but merely in trust for behoof of the parishioners residing on their respective estates; that these parishioners have themselves no civil right to such sittings, but are only entitled to the use of the parish church for the purposes of worship and administration of ordinances—these rights in his Lordship's view being merely *inter sacra;* and his Lordship holds that where, as in the present case, lands have been disjoined from one parish and erected *quoad sacra* into another, the persons residing on these disjoined lands lose all their rights in the original parish church, and have no right to church accommodation except in the church of the parish to which they have been annexed; and that, therefore, there being no persons in the disjoined portions to be benefited by an allocation of sittings, the heritors thereof are not entitled to participate in the division.

But, my Lords, the opinion so expressed by the Lord President was strongly controverted by the Appellants' counsel; and it was contended that the true principle was, that sittings in parish churches were allocated to heritors, not merely for behoof of those resident on their respective properties, *but also* for behoof of the parishioners generally, who were entitled to the use of any sittings which might not be required for those resident on the properties of the heritors to whom the sittings were allocated. My Lords, the point so raised is one of considerable difficulty as well as of importance. I think if it had been raised in a competent process,

(1) Mor. Dict. 7920.

H. L. (Sc.) 1877 — DUKE OF ROXBURGHE v. MILLAR.

with reference to the allocation of sittings in a new church, where subsisting rights were not interfered with, it would have been very fit to be considered and decided. But, my Lords, I am inclined to think that the point cannot be competently raised here, to the effect, at all events, of depriving heritors of sittings which they have legally held for a long series of years; and I think that the question cannot be held to have been very satisfactorily raised, considering that it has only been discussed *ex parte*. I am further of opinion that its decision is not necessary to the disposal of the question before the House, which, in my view, is one relating only to the mere regulation of the existing possessory rights of the heritors. I therefore avoid expressing any opinion on the points so ably dealt with by the Lord Presidents and some of the other Judges.

I may state that I do not consider that your Lordships' judgment in the case of *Hutton* v. *Harper* (1) affects the question raised in the present appeal. In that case the point raised was one relating to the proclamation of banns, which was considered by the Court below, and also by your Lordships, to be a proceeding or right purely *inter sacra*, and not affecting civil rights.

My Lords, it was contended on behalf of the Appellants that as at the time when the old church was excambed for the new they were in the occupation of sittings in the parish church of *Jedburgh*, and as their possession of these sittings was to be ascribed to an undoubted legal title, their right to sittings must be regulated according to the fair and legal import and effect of the contract of excambion. My Lords, I think this contention is entitled to great weight, and that it affords sufficient grounds for the decision of the question before the House.

I think the question must be decided now in the same way it would have been if it had arisen with reference to a re-allocation of sittings in the old parish church of *Jedburgh*, if that had been necessary in consequence of the re-seating or repair of the church The Appellants were legally possessed of sittings in the old church, which they retained for twenty years after the erection of the *quoad sacra* parish of *Edgerston*, and which I think they would have been entitled to retain in the old church; and if a re-allocation had become necessary I think they would have been entitled to participate in it in proportion to the sittings they

(1) Law Rep. 1 Ap. Ca. 464.

originally held. I think it makes no difference in their rights that the subject of allocation is not the old parish church, but the new. The new church was given and accepted in exchange for, and in lieu of, the old; and the rights of the heritors in the new must in my opinion be dealt with in the same way as they would have been if a question had arisen in regard to the old church. It is stated by the late Mr. *Dunlop*, in his work on Parochial Law, p. 41, that

> If a certain state of possession have subsisted for a long period, although there be no evidence of a regular division, such will be presumed to have taken place, and the Court will not sanction any alteration, notwithstanding a change of circumstances in regard to the property of the parish.

And he refers to several cases (1) in which it has been decided that possession of sittings in a church gave the possessors right, on a re-allocation, to equivalent accommodation. It was so held in the case of *Smith*, before referred to. And in the case of the *Magistrates of Hamilton* the point was very fully considered. The question there occurred with reference to a gallery which the magistrates had occupied for more than a century, under an agreement made with the Duke of *Hamilton*. The heritors contended that the magistrates did not possess an absolute and exclusive right of property in the gallery—and that, on the contrary, any use they had had did not flow from any right of property, but was merely *ex gratia* of the *Hamilton* family, of whose portion of the area of the church the gallery formed a part. But the Court held that the corporation could not be dispossessed of their gallery. The Lord Justice Clerk (*Hope*) said,

> If they got the gallery in this church simply by agreement with the Duke of *Hamilton* in 1734, still that was by an agreement made known to all, and in lieu of the seat they had in the old church; and after possession for more than a century, I am of opinion that they are entitled to maintain their seat even after such repairs as had been made, and which might give rise to a division of the rest of the area that had been so materially altered.

Lords *Medwyn* and *Cockburn* expressed views to the like effect; while Lord *Moncreiff*, though differing from their Lordships in the result at which they arrived, stated

> Where a new division becomes necessary, if specific legal rights had been pre-

(1) *Cathcart*, &c., (*Greenock*), November, 1785, M. 7928. *Sinclair*, February, 1761, M. 7918. *Smith*, June, 1826, 4 S. & D. 738.

H. L. (Sc.) 1877

DUKE OF ROXBURGHE v. MILLAR.

viously established in individuals, or corporations, these will be duly regarded and preserved in the division.

I so entirely concur in the opinions expressed by Lords *Deas* and *Mure* in the present case (1) in regard to this matter, that I take the liberty of quoting a few sentences. Lord *Deas*, in his opinion, says,

> The one church has been excambed for the other, and the natural result of that excambion appears to me to be that the parties who were previously in possession of the one should now be entitled to possession of the other. The case is not varied by the fact that the Marquis had to build a church, to be conveyed by the excambion, in place of being possessed of an existing church suitable to be so conveyed. It is still a case of excambion of one church for another; and nothing can be more expressive of the nature of the transaction than the word "excambion" itself, which is both the legal and the conventional name of the contract.

His Lordship goes on to say that,

> There would necessarily be a change of arrangement, rendering judicial regulation necessary; but for this the Sheriff was just as competent, where the question arose upon a contract of excambion, as if it had arisen in any other way. I think what he should have done was simply to have regarded the new area as substituted for the old, allocating it, as nearly as might be, as the parties themselves had previously and immemorially allocated it, and making no further changes than the different arrangement of the seats rendered necessary. There was no expense to be allocated either for building or for repairs. All that fell to be done was to modify and regulate the possession so as to give effect to the contract of excambion.

And Lord *Mure*, in concurring in the opinion of Lord *Deas*, says,

> Although there does not seem to have been any express stipulation in the proceedings relative to the excambion to the effect that the Appellants were to have right to seats in the new church, I think that this may be held to be implied in the transaction; because the nature of that transaction, as disclosed in the deed of excambion, appears to me to be that when the old church was exchanged for the new, the latter was to be conveyed to the whole heritors of *Jedburgh*, including the Appellants, as a *surrogatum* for their right to the old church, which was conveyed by them to Lord *Lothian*; and that they were thus to acquire in the new church rights equivalent to those which they had in the old. There is nothing in the proceedings to shew that these Appellants abandoned, or ever intended to abandon their right to sittings in the new church corresponding to those which they held in the old one. And the circumstance that they may be in one view no longer heritors in the parish of *Jedburgh*, is not, I conceive, of itself conclusive against their right to claim sittings in the new church.

Now, my Lords, entertaining these views, I am humbly of opinion that the Sheriff and the Court of Session have gone wrong

(1) Scotch Cases, 4th Series, vol. iii., pp. 736, 754.

in holding that the Appellants are not entitled to share in the allocation of the sittings in the new church substituted in room of the old; and I venture, with great deference to those learned Judges in the Court of Session who hold a different view, to concur in the judgment which has been moved by your Lordship on the woolsack.

Judgment of the House:—After hearing Counsel for the Appellants, all heritors of the parish of *Jedburgh*, praying that the matter of an interlocutor of the Sheriff of the 30th of April, 1875, so far as it "finds that, in so far as regards the dividing and apportioning of the area and seatings of the new parish church of *Jedburgh*, the heritors of the lands so disjoined and erected into the parish of *Edgerston*, *quoad sacra*, are not to be considered as heritors of the parish of *Jedburgh*," and "finds that the remaining two-thirds fall to be allocated and divided among the other heritors of the parish according to their valuations as appearing in valuation rolls;" and also an interlocutor of the Lords of Session in *Scotland*, of the First Division, of the 2nd of June, 1876, so far as "The Lords having resumed consideration of this cause, with the assistance of three Judges of the Second Division, and heard Counsel on the appeals and proceedings, after consultation with the said three Judges, and in conformity with the opinion of a majority of the seven Judges present at said hearing, refuse the appeals," might be reviewed before Her Majesty the Queen, in Her Court of Parliament, and that the said interlocutors, so far as aforesaid, might be reversed, varied, or altered, or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen, in Her Court of Parliament, might seem meet (which said appeal was, in pursuance of an Order of this House of the 19th of April last, heard *ex parte*.)

It is ordered and adjudged that the said interlocutors, so far as complained of in the said appeal, be, and the same are hereby reversed: And it is declared, that, after setting aside seats for the minister and elders, and for the beadle and the poor, the division and apportionment of the seats in the parish church at *Jedburgh* recently erected ought, so far as the circumstances of the case will admit, to follow and be regulated by the division and apportionment thereof in the former parish church for which the new parish church was substituted by way of exchange: cause remitted back to the Court of Session to do therein as shall be just and consistent with this judgment and declaration.

Agents for Appellants: *Connell, Hope, & Spens.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1877 July 10.

DUDGEON . . . . . APPELLANT;

THOMSON AND DONALDSON . . . . RESPONDENTS.

Appeal allowed, to prevent further Litigation.

Notwithstanding an irregularity through inadvertence in the Court below, the House, by the desire of both parties, to stop litigation, reviewed the judgment complained of.

Patent, Infringement of.

When a combination of instruments is the invention patented, an infringement of the patent must be an infringement of the combination.

A patentee having altered his specification by disclaimer, lodged a complaint against certain manufacturers for breach of an interdict granted anterior to the disclaimer:—

Held, that the patentee ought to have instituted a new action; and that, although the instrument of the manufacturers was intended to execute the same work, it was no infringement; THE LORD CHANCELLOR (1) observing that although it was cognate, it had not the characteristic feature of the patentee's invention.

Per THE LORD CHANCELLOR:—The Appellant's invention as it stood before the disclaimer may have been new, useful, and legal, but it might not have been so under the altered specification. After the disclaimer the question of enforcing the old interdict could not be entertained.

Per LORD BLACKBURN:—The phrase "colourably" is very apt to mislead in these cases. If part of the property in the invention be really taken, there is an infringement, however much that may be disguised. What is claimed here is the "combination" of three instrumentalities, which are all that are absolutely essential.

MR. *RICHARD DUDGEON*, an engineer in *London*, on the 31st of January, 1873, obtained from the Lord Ordinary (2) an interdict restraining Mr. *William Thomson*, an engineer in *Glasgow*, from infringing his (Mr. *Dudgeon's*) patent of 1866; which interdict was adhered to on the 4th of July, 1873, by the First Division of the Court of Session (3).

On the 30th of July, 1873, the Respondent *Thomson*, having entered into partnership with the above Respondent *Donaldson*,

(1) Lord *Cairns*.
(2) Lord *Mackenzie*.
(3) 11 Macph. 863; 45 Scot. Jur. 528.

they, on the 24th of April, 1874, obtained letters patent for "a new or improved expander of boiler tubes." Mr. *Dudgeon*, in May, 1875, altered by disclaimer his specification of 1866; and in November, 1875, he began a new action of suspension and interdict against the Respondents, alleging that their new tool was an infringement of his patent. This prayer was identical with his prayer against *Thomson* of January, 1873. The First Division held, on the 17th of March, 1876, that they could not grant a second interdict under the circumstances.

Their Lordships thereupon sisted process to allow the Appellant to bring a complaint for breach of the original interdict (1). He then proceeded, not by way of a new action, but by petition and complaint, for breach of interdict, which interdict had been granted before his disclaimer.

On the 22nd of December, 1876, the First Division of the Court of Session (Lord *Deas* dissenting) held that no infringement had been committed by the Respondents (2). Against that decision the present appeal to the House was brought.

Mr. *Aston*, Q.C., Mr. *Balfour* (of the Scotch Bar), and Mr. *Carpmael*, were heard for the Appellant, contending that the Respondent's tool was clearly an infringement; that the Appellant was not limited to any particular form or size of rollers, cylindrical or otherwise; that the Respondents' cylindrical plug was an exact equivalent for the Appellant's conical plug—the Respondents' tool was but a colourable imitation; and that the Respondents had really appropriated the whole of the Appellant's combination.

Mr. *Benjamin*, Q.C., and Mr. *Everitt*, were heard for the Respondents.

The argument on both sides turned wholly on technical details, illustrated by drawings exhibited at the Bar and handed up to their Lordships.

The case as decided below, is reported very fully (3)

(1) 4th Series, vol. iii., p. 604.
(2) 4th Series, vol. iv., p. 256.
(3) 11 Macph. 863; 45 Scot. Jur. p. 528; 4th Series, vol. iii., pp. 604, 674; 4th Series, vol. iv., p. 256.

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (1):—

My Lords, the argument at your Lordships' Bar has occupied a portion of time altogether disproportionate to the difficulty of the case and to the complexity of the facts required for its determination. It is only necessary to remind your Lordships exactly of what those facts are. The Appellant is the owner of a patent granted in the month of March, 1866. The original specification was modified very largely by a disclaimer and memorandum of alteration dated in the month of May, 1875. But, my Lords, during this interval of nine years between the date of the original patent and the date of the disclaimer, proceedings had been taken by the Appellant against *Thomson*,—one of the present Respondents; and the result of those proceedings, founded upon the patent as originally specified, was that an interlocutor was pronounced by the Lord Ordinary and confirmed by the Court of Session against that Respondent.

My Lords, that interlocutor followed the terms of the conclusion of the summons. The Lord Ordinary on the 31st of January, 1873, suspended and interdicted in terms of the note of suspension, which prayed that the Respondent should be interdicted in particular from—

"Making, vending, or using, in whole or in part, the improvements in apparatus used in expanding boiler-tubes described in the specification filed on the 30th of August, 1866, in pursuance of the proviso" in the letters patent; "and in particular from making, vending, or using any apparatus for expanding boiler-tubes constructed or used in the manner described in the said specification, or in manner substantially the same, and from infringing the said letters patent in any other manner of way."

That was in January, 1873. Then came the disclaimer and alteration of the specification in May, 1875; and with regard to the particulars of that disclaimer and alteration, at present it is not necessary to say more than that the disclaimer and alteration modified very largely the original specification, and modified it in matters which were closely connected with, and indeed were inseparable from that which is the subject of the present contest.

After the disclaimer and alteration of 1875 the patentee, the

(1) Lord *Cairns*.

Appellant, considered that his patent was being infringed by the two Respondents together; and he applied to the Court of Session upon that subject. In the first instance he appears to have commenced a fresh action against the Respondents, but after some time that action was sisted; and, apparently encouraged or recommended by the Court, he proceeded against the Respondents, not in the fresh action, but by way of an application to enforce the interdict which had been granted in the former action; and accordingly that application came before the Court and was refused upon the merits.

Now, my Lords, before I pass to what I shall afterwards consider as the merits of the case, I must point out to your Lordships the strange irregularity which has taken place in the Court below. According to the statute (1), after a disclaimer and memorandum of alteration has been filed in the case of a patent, unless the law officer has specially granted permission, no action can be brought by the patentee upon the score of an infringement committed before the disclaimer; but what is here done is what would be still more contrary to natural justice than would be an action for an infringement before a disclaimer. The patentee before his disclaimer had obtained an interdict from the Court. Of course before that interdict could be granted the person alleged to have infringed had an opportunity of defending himself against the interdict upon every ground of defence which is ordinarily open against a patentee. He had a right of contending, and apparently he did contend, that the patent was invalid by reason that it was not properly specified. He might have contended that it was invalid by reason that the invention was not new, or that the invention was not useful. It would not be, and could not be, until after all these defences were determined against the alleged infringer that the Court could go on and consider the question of fact whether he had actually infringed the patent or not; for unless the patent had all the ordinary elements of validity in itself it could not be made the means of complaint by reason of an alleged infringement. I assume, therefore, that before the interdict was pronounced all those issues going to the validity of the patent as it then stood were decided in favour of the patentee.

(1) 15 & 16 Vict. c. 83, s. 39.

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

But then, my Lords, look what happens after the disclaimer and alteration. The specification is altered largely and most materially. The invention may have been a new invention as it stood originally, but it may not be new as it appears under the altered specification. The invention may have been useful according to the original specification, it may not be useful according to the amended specification. The original specification may have complied with all the exigencies of the law, and been such as is requisite in the case of every patent, but the amended specification may be wanting in all those qualities which are required by the statute (1). And yet not one of those issues has been decided against the Respondents in this case; nay more, not one of those issues could be decided in the present proceedings, because, when the Appellant appeals to the Court to enforce its interdict granted in the former action, the Respondents are obliged to confess that in that former action the questions of novelty, of utility, and of sufficiency of the specification are all *res judicata*, already decided against them. My Lords, without going beyond that, and pointing out that upon the *factum* of infringement that which would be an infringement of the old specification may be none whatever of the new specification, the former considerations alone would satisfy your Lordships, I think, how extremely irregular it was in those who were engaged in this proceeding in *Scotland* (2) to suppose that after the memorandum of alteration and the disclaimer the question of enforcing the old interdict could be entertained by the Court.

My Lords, I have said thus much in order that it may not appear that your Lordships have overlooked the irregularity which has taken place; but as the question now stands both parties have desired that the course which probably would be the strict course should not be taken, namely, that the appeal should be dismissed, leaving the parties to resort to a continuance of the second action which has been commenced in the Court of Session. They ask your Lordships on the contrary to determine the question which was submitted to the Court under the old interdict, namely, whether, taking the amended specification, there has been by the act of the Respondents an infringement of that amended

(1) 15 & 16 Vict. c. 83. (2) Scotch Cases, 4th Series, vol. iii. p. 609.

specification. Your Lordships, in mercy to the parties, are willing, as I understand it, to consider that question and to determine it by way of review of the determination of the Court of Session.

Now, coming to that question of infringement, it appears to me to rest within very narrow bounds; and in order to determine it I must ask your Lordships in the first place to satisfy your minds as to what it is which is the principal characteristic, the essential feature, of the Appellant's invention as specified in his patent. So far as we can learn from the materials before us, up to the time when this patent was originally taken out, the mode by which the tubes of boilers were securely fastened into what I think is called the tube piece or the flue piece, the end of the boiler, was this: there was a circular hole made in the flue piece, and the tube to be fastened into that hole and made steam tight was placed in the hole at right angles, and then, in order to swell out the tube and fasten it into the hole prepared for it, it appears that a cylindrical or circular wedge was introduced into the tube; that percussion was used either upon the wedge alone, or upon the wedge in the centre with some further substances placed round it, and by percussion the tube was stretched and expanded in such a way that at last it was brought to fit into the flue piece.

But, my Lords, that operation of course had this manifest inconvenience and defect—it had a tendency by the straining caused by the percussion to lacerate the fibres of the metal of the tube, and in some instances to burst the tube; and, in addition to that, the percussion of one tube in the flue piece had a tendency to shake and disarrange the other tubes which were fastened into the flue piece all around it. The invention of the Appellant was for the purpose of obviating these inconveniences, and he addressed himself to the subject in this way: He states that it will be better, in place of applying percussion, to apply roller surfaces to the interior of the tube—friction rollers which will have the effect, not by way of percussion, but by way of rolling, to flatten out, expand, and make thinner, the metal of the tube, and in that way gradually to enlarge it until it fits into the flue piece. If in order to do this the Appellant had taken what I may term a bunch or fasciculus of cylindrical rollers, and had placed them in the tube and had inserted among them a centre cylinder to which he gave motion,

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

so that the centre cylinder rotating would make the cylinders round its periphery (the cylinders of the fasciculus) rotate also; of course all that might have been done, and yet the object of bringing strong pressure to bear upon the tube would not have been accomplished. The rollers would rotate, but there would be no point of contact coupled with pressure upon the tube. Therefore it is obvious that the point and gist of the invention must be, not the insertion of friction rollers or circular rollers in the tube, but some mode by which those rollers can forcibly be brought to bear upon the concave surface of the tube all round, so as strongly to press out the tube. And accordingly your Lordships will find in the specification of the Appellant means distinctly pointed out for that purpose.

I will ask your Lordships to look at a few sentences, both in the specification as it originally stood and in the specification as it stands after alteration, because some of the expressions in the original specification strongly bear upon the invention as it ultimately appeared. I pass over the introduction, which stated "the principle of the invention which constitutes the subject-matter of this patent is to expand the tube by rolling the metal by the application of one or more pressure rollers to the interior of the tube." Of course that does not describe any invention; it only describes what is the subject-matter which is going afterwards to be explained.

I pass over a number of descriptions of different modes by which machinery might be made for the purpose of attaining the object in view, and I come to the conclusions which are drawn from the whole of these particular details. In the original specification the patentee described a tapering plug, as it was called, which was placed in the centre of three cylindrical rollers, which cylindrical rollers might either be parallel to the plug and to each other, or might be placed slightly askew to the centre plug, so that they might somewhat vary the effect of the screw. But having described that tapering plug which was to be introduced into the midst of these three cylinders, and as it proceeded and worked its way forward was to expand and push out these cylinders, because these cylinders were to have been so arranged that they were not rigidly to be kept in their places but might be forced out radially,

having described that he says, "although a tapering or wedge-formed plug is preferred as the expanding instrument."

Now, my Lords, I stop there to observe that that must mean the instrument expanding the cylinders, not expanding the tube, because what is spoken of is, not the whole of the tube but the plug and the plug only. "Although a tapering or wedge-formed plug is preferred as the expanding instrument, the invention is not limited to an expanding instrument of that form, as circumstances may render expedient the use of an expanding instrument of different form, thus when a tool is sufficiently large an arrangement of toggle-jointed levers may be inserted in it for the purpose of expanding the roller in place of a tapering plug." My Lords, I read that sentence as saying, I do not limit myself to the particular expanding instrument in the centre of the cylinders which I have described as the tapering plug. You may have an instrument which will attain the same result, that is to say the result of expanding or driving out the cylinders, in another way, such as an arrangement of toggle-jointed levers, but the result must be the same as will be achieved by the tapering plug.

I ought to say that that sentence which I have read disappears in the alteration, but this which I am now going to read is continued there: "In all the above described modifications of the roller expanding tool at least one roller is combined with a tapering plug (or its equivalent, by whose action the roller is forced outwards in the tube)." My Lords, in the specification as altered "at least one roller" is struck out and "rollers" substituted, so that it runs: "In all the above described modifications of the roller, expanding tool rollers are combined with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder, by which the roller is prevented from twisting sidewise as they are turned round in the tube." Then it continues: "These three instrumentalities" (this is struck out in the amendment) "are all that are absolutely essential to the construction of the roller expanding tool, but the cutter and ratchet handle constitute with the said instrumentalities or implements useful combinations which are supplementary to the aforesaid fundamental combination." Then it proceeds, "what is claimed, therefore, as the invention to be secured by

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

letters patent is, the combination in an expanding tool of the following implements, viz., the roller, roller stock, and expanding instrument, these three operating in combination substantially as set forth."

Now, my Lords, I pause there for the purpose of pointing out to your Lordships that in the first place, although after the mention of a tapering plug there is put by way of alternative its equivalent, the interpretation of that alternative is immediately afterwards given. He says, as it were, by equivalent I mean something by the action of which the roller is forced outwards in the tube. And then also your Lordships have this; under the statement that the "three instrumentalities are all that are absolutely essential to the construction of the roller," one of the instrumentalities being the tapering plug or its equivalent as so defined, you have implied this further statement—that the tapering plug or its equivalent as so defined is absolutely essential to the invention. Thus your Lordships have when you come to the claim an interpretation placed upon what he claims, namely, the three things in combination, the roller, the roller stock, and the expanding instrument, the three operating in combination substantially as set forth.

Now, my Lords, I must say further that not only is that, as it seems to me, the legitimate and the necessary construction of the document, but I must add that, according to all the information that is before me, and according to my understanding of the subject-matter of this operation, if the patentee had here claimed the rollers and the roller stock, either one or both of them, he would have claimed that which would have made this patent perfectly useless. Nothing would have been done by means of the rollers *alone* or of the roller stock alone. Moreover, so far as I am aware, it would have been extremely difficult to say that there was any novelty in a roller stock of that kind or in rollers of that description. The point which gave the characteristic to the whole, and which he justly called a point absolutely essential to his invention, was the tapering plug acting as an expander driving out those cylindrical rollers placed around the plug, and thus producing that which, as I stated at the beginning, must have been the desideratum in this invention, a heavy continuous forcible

pressure against the inside of the tube for the purpose of expanding it.

Now, my Lords, that being the characteristic and the essential feature of the invention of the Appellant, as I understand it, it only remains to consider what it is that the Respondents do. What is the instrument which they sell? They do not in any way expand or drive out their cylinders from the centre. They have no tapering plug, and in that sense have no expanding instrument. They have not their rollers fixed in radiating slots so that they would be capable of being expanded, that is to say driven out from the centre. But what they have is this. They have what I have termed a fasciculus of rollers, but their three rollers, in place of being three parallel perfect cylinders, are tapering cylinders placed together, and the centre of their tool is not a tapering plug, but is itself a centre cylinder. The centre cylinder gives motion to the wedge, wedge-formed, or tapering cylinders, which are placed around the centre cylinder, but the whole is worked not by way of pressing out the cylinders against the tube, but as a complete wedge inserted in the tube, having the contour of a wedge, and of expanding the tube, flattening out the tube, by working its way into the tube like a rotating wedge.

It would have been quite possible for the Appellant, when he was specifying his invention, to have specified also a tool which would have the peculiarity of the instrument of the Respondents. I have no means of knowing why he did not do so. It may have been because it did not occur to him—it may have been, on the other hand, because he was aware that if he had done so he would in some way, by reason of want of novelty or otherwise, have endangered his patent. It is sufficient for my purpose that he has not described a tool of the kind which I have mentioned. There can be no doubt, as it appears to me, that the instrument used by the Respondents is not the instrument described and patented by the Appellant.

A great deal of the argument at your Lordships' Bar has been to shew that though not the instrument described and patented by the Appellant, it is what has been termed in the argument a "colourable imitation." Now, my Lords, the words "colourable imitation," are words which appear to me not very happily

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

chosen, and calculated to create some confusion. I am quite aware that they are words which are used sometimes in the argument of patent cases, but I doubt very much whether the particular expression is one which has any great authority for its use. There is a well-known manner in which the word "colourable," or "colourably," is used in patent cases. I have referred to the ordinary form in which injunctions are granted in patent cases by the Court of Chancery, and I take from Mr. *Seton's* book an example which appears to me to be exactly in accordance with what I recollect to be the practice of the Court in granting injunctions. It is in a case which, I think, came before my noble and learned friend as Vice-Chancellor, the case of *De la Rue* v. *Dickenson* (1). The injunction restrains the Defendants, their agents and servants, during the continuance of the patent, from "using or employing any machines similar to the machine in the Plaintiff's bill stated, or any machinery, mechanism, or mechanical contrivance made or arranged according to the Plaintiff's said patent inventions, or differing therefrom only colourably, or by the substitution of mere mechanical equivalents for the same."

Now, my Lords, what I understand by that, is this, if there is a patented invention, and if you, the Defendant, are found to have taken that invention, it will not save you from the punishment or from the restraint of the Court that you have at the same time that you have taken the invention dressed it up colourably, added something to it, taken, it may be, something away from it, so that the whole of it may be said, as is said in this injunction, Here is a machine which is either the Plaintiff's machine or differs from it only colourably. But underlying all that, there must be a taking of the invention of the Plaintiff. There used to be a theory in this country that persons might infringe upon the equity of a statute, if it could not be shewn that they had infringed the words of a statute; it was said that they had infringed the equity of the statute, and I know there is, by some confusion of ideas, a notion sometimes entertained that there may be something like an infringement of the equity of a patent. My Lords, I cannot think that there is any sound principle of that kind in our law; that which is protected is that which is specified, and

(1) Seton on Decrees, 3rd Ed. p. 911.

that which is held to be an infringement must be an infringement of that which is specified. But I agree it will not be the less an infringement because it has been coloured or disguised by additions or subtractions, which additions or subtractions may exist and yet the thing protected by the specification be taken notwithstanding.

My Lords, when I look at that which the Respondents have in this case done and the article which they have sold, it appears to me to be a different article from the article specified. It is, no doubt, a cognate invention; it aims at accomplishing the same purpose; it uses, no doubt, friction rollers, but it has not that thing which the patentee in this case has chosen (I have no doubt for proper reasons) to describe as one of the characteristic features of his invention, and which, as it seems to me, he might almost have said was *the* characteristic feature of his invention; because, as it seems to me, it was that without which his invention would have been absolutely *nil*.

Now, my Lords, those are the grounds upon which, dealing with this case as the Court of Session have dealt with it, and assuming as your Lordships are willing to assume, that this question of infringement may be decided in these proceedings, I come to the conclusion that the view taken by the majority of the Court of Session was the correct view of the case, and that a violation of this interdict, even as applying to the altered specification of the Appellant, has not been made out. I therefore submit to your Lordships that the appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, I entertain the same opinion as that which has been expressed by my noble and learned friend on the woolsack.

First, with regard to the course which has been taken in this case, through inadvertence, I think, in the Court below, as to the granting of the original interdict, and the continuance of that interdict after the disclaimer by the Appellant of some portion of his invention, that course is one which we cannot pass by in silence, because if you look to the very terms of the disclaimer which has been put before us, you will see at once how unjust it is that an interdict granted in a totally different state of circum-

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

stances should be continued when such a change of circumstances has taken place. The statute (1) expressly states with reference to a disclaimer, which in itself was a considerable privilege granted to patentees, that as a condition of the disclaimer being entered, it should be necessary to take care that that there should be no proceeding in respect of any alleged infringement or breach of the patent anterior to the disclaimer unless the Attorney-General should certify that it was fit and proper that such proceedings should be had.

In the very disclaimer which we have before us, the reasons of the disclaimer are stated to be these: "Whereas it has been alleged that before the date of the said letters patent certain experimental tools had been made for expanding the ends of boiler tubes somewhat similar in action to those described in the specification;" therefore he disclaims them. That, in other words, means that it has been alleged that his patent is not new; and I think one may assume that this disclaimer having been made, that which is so alleged is not very far from being the fact. At all events, it was an admission on his part that there was that allegation, and that he was not prepared to maintain the contrary, and therefore he thought fit to disclaim.

Now, my Lords, this observation arises with regard to the interdict which has been granted. The interdict had been granted upon a specification of a patent which, as the noble and learned Lord who preceded me has said, was not disputed in respect of novelty, but if the Court had been informed of as much as the patentee appears afterwards to have been informed of with respect to these allegations, and the nature and substance of them, it might very well have held, and in all probability would have held, that the patent on which it was asked to grant an interdict was a patent which was void for want of novelty.

The patentee's next statement in the recital is, "Whereas experience has shewn that such tools in consequence of such disadvantage are of small practical value;" and then again, "Whereas experience has shewn that the supplementary combinations," which he refers to in words, "are not of any great practical value;" in other words, he has been informed that his

(1) 15 & 16 Vict. c. 83, s. 39.

patent was for a thing which was useless, and which, therefore, might be avoided upon those two grounds. He says he has been so informed—of course that does not tell you that he acquiesces in that, or that he has acted upon it, but he has acted in making his disclaimer in consequence of apprehensions excited in his mind both as to novelty and as to usefulness with regard to his invention.

However, it is very satisfactory that we have not to determine the case upon these grounds, for our doing so would only put the parties to more expense and inconvenience than they must have been already subjected to, as all parties unfortunately are in these heavy patent litigations. Consequently I, with more satisfaction, approach the substantial merits of the case.

My Lords, I have come to the conclusion that that which the Respondents have done in constructing their machine is not an invasion of that which the Appellant has chosen to protect by his letters patent. When the disclaimer has been duly recorded, you find the Appellant claiming this: he claims that which he describes in full, namely, certain rollers whereby the metal tubes are expanded by rolling. The combination that he prefers is that of three rollers and a tapering tool, which, by its insertion between these rollers, does two things—it communicates motion to the rollers, and it also, by its tapering form, gets "swallowed up," as it has been termed both by the Court and by some of the witnesses, in the process of its rotating motion as it proceeds by that rotating motion to enter in between the rollers, and gradually assumes a larger diameter; that larger diameter necessarily presses upon the rollers, which are also at the same time set in motion, and so, pressing against the rollers laterally, forces these rollers from the centre against the sides of the tube more and more as it advances in between them. This appears to have been an ingenious invention, and something apparently very superior to the former mode of expanding boiler tubes.

The Appellant mentions certain modifications in the disclaimer, and having stated what portions of his patent he has disclaimed, he proceeds to state, in one uniform consecutive narrative, what remains of his patent after the disclaimer. He uses these words, "In the above described modifications of the roller expanding

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

tool, rollers are combined with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube) and with a stock, or holder, by which the rollers are prevented from twisting sidewise as they are turned round in the tube." Then he says, "What is claimed therefore as the invention to be secured by letters patent" (it is plain and simple enough), "is the combination in an expanding tool of the following implements, namely, the rollers, roller-stock, and expanding instrument, these three operating in combination substantially as set forth."

Now, my Lords, there can be no doubt whatever that the Appellant has described first of all a compound thing, namely, an expanding tool. He claims the compound thing; he has described equally distinctly the three separate parts of that compound thing, and he claims those three separate parts in combination. These are three perfectly distinct things, and the expanding instrument is as plainly as possible in that claim distinguished from the thing called the expanding tool in the former part of the patent, which is the whole machine in its complete form. Therefore the three parts are the rollers, the roller-stock, which supports the rollers in order that they may be so operated upon with safety by the expanding tool, and the expanding instrument, the thing which produces the expansion by forcing them outwards; "these three operating in combination substantially as set forth."

When that is compared with the original letters patent before the disclaimer, if there was any doubt at all about the meaning, that doubt would be at once resolved by seeing that he says something very similar there. In the letters patent of 1866 he says: "In all the above described modifications of the roller expanding tool" (that is, the whole instrument), "at least one roller is combined with a tapering plug" (or its equivalent, by whose action the roller is forced upwards in the tube), "and with a stock or holder, by which the roller is prevented from twisting sidewise as it is turned round in the tube. These three instrumentalities are all that are absolutely essential to the construction of the roller expanding tool." He says there that he has a combination, that that combination is what he describes it as being after the disclaimer just as he had done before, namely, the three instruments, the rollers themselves; the roller-stock,

that which holds the rollers together, and the tapering tool. "But," he proceeds to say, "the cutter and ratchet handle" (which are afterwards disclaimed), "constitute with the said instrumentalities or implements useful combinations which are supplementary to the aforesaid fundamental combination. What is claimed, therefore, as the invention to be secured by letters patent is the combination in an expanding tool of the following implements, namely, the roller, roller-stock, and expanding instrument, these three operating in combination substantially as set forth." Those are the very words of the claim in the patent after the disclaimer has been made, and coupled with the preceding portion of that paragraph in the patent of 1866, you see plainly and clearly, if there were any doubt at all on the subject,—to my mind I confess there was no doubt before,—what is the nature of his claim. It is a claim of those three things in combination; and the question now is whether or not that combination has been infringed by the Respondents.

Now, my Lords, I am content as to that part of the case to refer to the view taken by the Lord President (1), which appears to me very neatly and clearly to express what the differences are. He says: "The question comes to be whether the tool now used by *Thomson* comes within the description of the original patent. This tool lately used by *Thomson* certainly differs from *Dudgeon's* tool in some very remarkable particulars, and the question is, whether these variations take it out of the patent? In the first place, the rollers of *Thomson's* tool are not made to diverge from the axis of the tool, and therefore it is by no such divergence that they are made to press against the tube"—the fact being that the rollers of the Respondent *Thomson* are themselves made of a conical form, with a varying diameter; and the consequence is that the whole tool itself (as distinguished from the dilating instrument, which is the tapering plug) has a wedge-like form, and is pushed forward in the tube and enters into the tube instead of a central tapering plug being used, which causes the cylinders to diverge, and which tapering plug alone enters into the tube that is to be dilated.

Then he says: "No doubt *Thomson* uses rollers, and to make

(1) Scotch Cases, 4th Series, vol. iv. p. 256.

BIBL. LONDIN. UNIV

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

these rollers work he is obliged to use a roller stock; but with these two points the resemblance comes to an end. *Thomson's* rollers are fitted in a different way for a different purpose, and act in a different way. *Thomson*, in the best form of his tool, has a plug in the centre of his tool, but it is not tapering, and does not force out the rollers by its action; and therefore it is not intended to do anything more than communicate a rotary motion to the rollers. The means by which *Thomson* effects his object of pressing the rollers against the interior sides of the tube is entirely different. He makes his tool a tapering or skew tool. The whole contour of the roller-stock and tool is different. It is conical in shape; the effect is, that the tool works itself into the tube, and gets swallowed by it. The result is, that the metal is gradually rolled out, first, by that portion of the tool whose circumference is smallest, and then by the parts of greater circumference. It is essential in *Thomson's* tool that it should constantly work into the tube, not like the roller-stock in the Appellant's tool, which must always remain stationary." In fact, the form which evidently the Appellant laid the greatest stress upon was that form in which the tapering tool alone should advance, and a collar be applied for the express purpose of preventing the rotating cylinders, which were making the direct pressure, from advancing with it.

It appears to me, my Lords, to be plain that all that *Dudgeon*, the present Appellant, has claimed is that combination which he has formed of the three things that he has described, and of which everything is an essential part, the plug being as essential as the rest; and the introduction of a cylinder instead of a plug at once puts an end to any notion whatsoever of its being a tool for the purpose of enlarging the tubes in which *Dudgeon's* instrument is introduced, because if you were to introduce a cylindrical plug instead of a tapering plug, it is quite plain and manifest that you would produce no action whatsoever upon the sides of the tube. You would communicate what Mr. *Aston* has two or three times told us is life and energy to the machine; but I apprehend if he had taken out a patent merely for the purpose of communicating life and energy to a machine by the introduction of a cylindrical boiler between other rollers, he would have found that the patent would have been of very little use or service to him. That patent

would have been for an invention which, I apprehend, has existed for many years—indeed, long before the existence of this patent. It could only be pieced out in the way I have mentioned, by saying: If you take off the collar and do that which the rest of my patent rather indicates is not the course to be taken, you may, by putting the rollers or cylinders which you use as rollers askew, so contrived as to form a combination by which, when the cylindrical plug is swallowed up by the others, and the others are askew, you may get an instrument something like that which *Thomson* has invented, or at least has used—I am not speaking of its novelty; novelty is not necessary to *Thomson*, but something which *Thomson* has used, and which he seems to have used very effectively.

It appears to me that nothing of that kind is contemplated in the original patent. The original patent, over and over again, both before and after the disclaimer, states that this tapering plug is the great and necessary ingredient, or one of the three necessary ingredients of the combination. That plug has not been taken by *Thomson; Thomson*, therefore, has not made the same combination; neither that combination nor anything like it, in fact, is his arrangement. His is a totally different arrangement—that by which the whole tool itself, as distinguished from the tapering instrument, is made to have a wedge-like or conical bearing, and having that wedge-like or conical bearing is introduced into the tube, and is so made to have the effect and perform the operation required. The circumstance that you may, by the introduction of that cylindrical roller, set the whole in motion, does not make it an infringement. The Appellant cannot say to *Thomson*: "You are not at liberty to use a well-known means of propelling any cylinder or roller with both a progressive and an expanding motion, and my patent is a protection against your adopting that form of communicating motion to rollers." I apprehend there is nothing of that kind claimed in the patent. If there had been anything of that kind claimed, the patent certainly, as it appears to me, could not have been sustained. I think, therefore, it is quite clear that what *Thomson* has done is no invasion of anything that the Appellant is entitled to claim as being within the protection of his letters patent.

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

LORD BLACKBURN:—

My Lords, I am also of the same opinion, and I agree with what has been said by the noble and learned Lords who have spoken before me, that there has been a mistake or misapprehension in the manner in which this question has been raised in the Court below. Whilst the old specification remained as it originally was, there was an interdict against infringing it in any way, and as long as it remained as it originally was, it would have been a very idle and vexatious thing to commence a new action in the same Court for an infringement of that patent for which an interdict had already been granted; and therefore the right course would have been to say, that interdict standing, raise your question upon an action for a breach of that existing interdict; and to that it would have been a perfectly good answer to say: What I have done is no breach of that interdict, for it is no infringement of the patent as then explained and defined by the existing specification. But there had been a disclaimer which altered the specification, and by altering that specification altered the patent for which it had been granted. I will not repeat the reasons which have been given by both the noble and learned Lords who have preceded me for saying that when that was the case it was not right to make an application for a breach of the interdict which prohibited the infringement of the old patent with the old specification; but that there ought to have been a proceeding for a new breach of the new specification of the patent in which the same question which has been now raised, which seems to have been the real question between the parties, could have been raised, namely, whether or not what was done by the Defenders was really a breach of the patent as defined and ascertained in the new specification. The same question was really raised, but it was raised in an irregular manner, and I perfectly agree with what the noble and learned Lords have said, that we ought not to allow it to pass with the supposition that the House of Lords sanctions that irregular manner of proceeding, although at the application of the parties we give an opinion and advise the House as to what the decision in law should be upon the question which goes to the merits, and which, if it had been properly raised, would have been still the same question, namely whether what the Defender has done is or

is not an infringement of the patent as defined and ascertained by the existing specification.

Now my Lords, as to that I agree with what was said by the noble and learned Lord on the woolsack, that the question is whether it is an infringement of the patent,—a taking of a part of the property in the use of that invention which has been given by the letters patent. The phrase "colourably" is very apt to mislead in these cases. If part of the property in the invention be really taken there is an infringement, however much that may be disguised or sought to be hidden. If that is detected by the patentee, and if what is taken is really part of his property given to him by the letters patent, he has a right to proceed against the infringer, however ingeniously the colours may have been contrived to try to conceal the fact that there has been a taking of part of the property. But for all that it is not correct to say that doing anything that answers the same object is necessarily an infringement of the specification; we must look at what is shewn in the specification. The terms and condition of the patent are that the patentee shall "particularly describe and ascertain the nature of the invention and in what manner the same was to be performed." Accordingly we look at the specification to see what is the nature of the invention for which the patent has been taken out as described and ascertained by the specification.

It may be that the question arises whether the particular thing is or is not within the specification. That question arises in the present case. It is said that the tool made by the Respondents comes within the specification and is an infringement of the patent. In such a case it is the interest of the patentee to give the specification as wide a meaning as he can give to it in order to make it take in the thing done by the alleged infringer. It might have been that it was the other way, and that the thing was known to be old, and then of course the patent might have been upset by shewing that it included an old thing. Then the position of the parties would have been reversed, and the interest of the patentee would then have been to argue that the true construction did not include this. But whether it is for the interest of one side or the other, I apprehend the duty of the Court is fairly and truly to construe the specification, neither favouring the one side nor the other,—neither putting an unfair gloss or construction

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

upon the specification for the purpose of saving a patent if it is said that the patent is void, nor putting an unfair gloss or construction upon it in order to extend the patent and make it take in something which you may think was an unhandsome taking of the fruits of his invention from the patentee if it is not really an infringement of the patent.

Now, my Lords, taking that view, we come to what I take to be the real question upon the merits. Waiving the prior matters which I have previously mentioned, the real question upon the merits is, what is the true construction of this specification as it stands? I have already pointed out that the words of condition have nothing about claiming. You may have a perfectly good specification without the word "claim" or the thing claim in it at all, but nevertheless a claiming clause is commonly inserted at the end of a patent, and that is of immense importance in enabling us to construe the specification and to see, looking at the whole specification, whether a thing is included in it or not.

Now my Lords, I turn back to this passage in the specification. I do not intend to go through much which has been said before me upon the mechanics, for I assume that that is in the minds of the noble Lords already. In every one of the instances which the Appellant gave—in every one of the machines which were worked—there was a tapering plug, or in the case where there were toggle-jointed levers, which were afterwards disclaimed, there was there a matter which forced apart the external pressure rollers which were brought in contact with the sides of the tube. That being so, he says, "In all the above-described modifications of the roller expanding tool" (that is the name he gives to his whole tool) "at least one roller is combined." In his amended specification he says, having struck out one roller, "rollers are combined with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder by which the rollers are prevented from twisting sidewise as they are turned round in the tube;" so it stands in the disclaimer. Then he goes on, "What is claimed therefore as the invention to be secured by letters patent is the combination in an expanding tool of the following implements, namely, the rollers, roller stock and expanding instrument, these three operating in combination substantially as set forth."

My Lords, I think upon that, as it stands, after the disclaimer, there can be no reasonable doubt in construction that what is meant by the expanding instrument is that which was previously called in the earlier part "a tapering plug or its equivalent, by whose action the rollers are forced outwards in the tube." That is the meaning of "the expanding instrument" in the combination of those three which he claims, and he claims that combination only. The word "therefore" shews it even there. But when we take, as I apprehend we are entitled to take, the old specification before the disclaimer in order to see what it means, that becomes still clearer. I say we are entitled to take it, for the object of a disclaimer is merely to take out and renounce part of what had been claimed before, and it would vitiate the new specification if by striking out that part you gave an extended and larger sense to what is left so as to make it embrace something which it did not embrace before. I do not think that is done here. After having mentioned the three the original specification said, "These three instrumentalities are all that are absolutely essential to the construction of the roller expanding tool, but the cutter and ratchet handle" (that is a thing which is disclaimed) "constitute, with the said instrumentalities or implements, useful combinations which are supplementary to the aforesaid fundamental combination." What is claimed, therefore, is the combination. I do not think that looking at that anybody could doubt for a moment what he means when he says that the combination he claims is "the aforesaid fundamental combination," and that aforesaid fundamental combination is in express terms said to be the three instrumentalities which are all that are absolutely essential, and the three instrumentalities which are all that are absolutely essential include a tapering plug or its equivalent, by whose action the rollers are forced outwards in the tube. It seems to me that when you look at that it is said as plainly as it could be said by any words which could be used for the purpose that the person who drew the specification meant to claim these three instrumentalities in combination, one of them being a tapering plug or some other instrumentality which forced outwards the external rollers which were in contact with the tube. That is the thing which is described—that is the combination in all the machines

H. L. (Sc.) 1877 DUDGEON v. THOMSON.

which he makes, and it seems to me to be clear, therefore, that that is what the claim is confined to.

I can only say this, when I come to the end of the specification in which the Appellant points out in words what he "particularly describes and ascertains as the nature of his invention," I find that he distinctly and pointedly says that he claims the combination, and nothing but the combination, of three instrumentalities, one of which is the tapering plug which has the effect of forcing the outer rollers asunder. It seems to me that he claims that and nothing but that; and the Respondents have done what they had a perfect right to do, having avoided infringing that combination, they have produced the same result by other means, which there was nothing to prevent them from doing.

LORD GORDON:—

My Lords, I certainly think that a mistake has been committed by the Court below in not considering that they were really proceeding upon an interdict which had been granted by Lord *Mackenzie* in 1873, and that that interdict had reference to the patent of 1866. What was sought was a declaration of a breach of interdict under the patent of 1866 as altered by the disclaimer of 1875. It does not seem to have occurred to the advisers of the parties, or to the Court, that they were really asked to proceed upon a totally different instrument, because the patent of 1866 had been materially altered and amended in 1875. Now, those alterations were really very marked.

We have not had an argument upon the first interdict; but it does rather appear to me that it may be questionable whether that interdict of Lord *Mackenzie* in 1873 ought to have been pronounced under the patent of 1866. We have had, however, additional argument now, and very able argument, at the Bar, and we have had the benefit of the opinions of the Court below, and I must say that I quite concur in the opinion of the Lord President. I think he has very clearly stated the views which I venture to submit ought to be adopted with reference to the patent, which at the date of his judgment was amended in terms of the specification. It is quite true that the Judges, when giving their opinions, do not appear to have placed any stress upon what was the most

material point of the alteration of 1875. I was struck with an observation of Lord *Deas* upon the judgment of the Lord President, that he had concurred in the interdict of 1873, which was Lord *Mackenzie's* interdict; and it occurred to me whether, perhaps, the Lord President had laid himself open to a charge of inconsistency in now proceeding to refuse the application which was under consideration at the time. It is not likely, I think, that the Lord President would fall into that error; but his opinion is quoted by Lord *Deas*. It appears clearly that what he was giving at that time was his observations upon the patent of 1866, and not the patent as altered and amended.

Now, any amendment or alteration of a patent is a very dangerous proceeding; and of course patentees feel that; because they are open to the observation that they are abandoning that which they claimed as their invention in a previous stage of the proceedings. I venture to think that the patentee in this case has fallen into that error, and that he has now exposed himself to the risk of having his original patent attacked by any person who can shew that really he has made an improvement upon what may have been originally a valuable invention, and one which had been sought after by many men of skill. We had a case not long ago before us—the case of *Clark* v. *Adie* (1)—where very much the same thing happened, and where that which was at first found to be a good invention was afterwards seized upon by one of the public, and the result was that that party could not be brought up for infringement.

My Lords, I can only say that I think the Lord President's judgment properly deals with this case, with this exception, that in consequence of its not having been properly brought before him he omitted a most material point, namely, that the original interdict was granted upon a patent which had since been materially altered. I therefore concur in the proposed judgment of your Lordships.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Agents for the Appellant: *Wilson, Bristows, & Carpmael.*
Agents for the Respondents: *Grahames & Wardlaw.*

(1) 2 App. Cas. 315, and Law Rep. 10 Ch. App. 667.

[HOUSE OF LORDS.]

H. L. (Sc.) 1877 July 3.

THE EDINBURGH STREET TRAMWAYS COMPANY . . . . . } APPELLANTS;

TORBAIN . . . . . RESPONDENT.

Tramway Statutes, 34 & 35 *Vict. c.* 89, *and* 37 & 38 *Vict. c.* 68—*Charge against Passengers.*

A tramway company scheduled to their Act of Parliament distinct agreements with municipal authorities not to charge tramway passengers above a fixed fare; but they afterwards obtained legislative authority to substitute omnibuses on certain routes in lieu of the tramways, and to charge a higher fare on these routes:—

Held, that the company had no power to increase the fare of passengers using the tramways only.

BY the *Edinburgh Street Tramways Act*, 1871 (34 & 35 Vict. c. 89), the Appellants were empowered to establish a tramway line between the *General Post Office, Edinburgh*, and *Bernard Street, Leith;* parliamentary contracts having been entered into with the *Edinburgh* and *Leith* corporations whereby the tramway company bound themselves "in no case to demand from any passenger a charge exceeding in the whole 1*d.* per mile (the minimum charge for any less distance than two miles not to exceed 2*d.*)"

The *Edinburgh* and *Leith* tramway line in due time was completed; but certain other tramway lines in the vicinity of *Edinburgh*, which the company undertook to create, they found too expensive to admit of remuneration; and in 1874 they applied to Parliament, and obtained an Act authorizing them to establish omnibuses instead of tramways on the above routes, and to "charge a sum not exceeding 2*d.* per mile for first-class passengers on those routes and any tramway routes worked in connection therewith." But nothing in this Act was to prejudice the agreements scheduled to the Act of 1871.

The company, however, increased the charge against inside passengers on the *Edinburgh* and *Leith* route, which ran in connection with the omnibuses, from 1*d.* to 2*d.* per mile. Mr. *Torbain*, on the 14th of December, 1874, became an inside passenger on one of the tramway cars from *Leith* to *Edinburgh*, and was

charged 3*d.*, but refused to pay more than 2*d.*, which he handed to the conductor (1). The company thereupon brought the present action against him for the difference, one penny, and also prayed a declarator that they were entitled under the Act of 1874 to charge 2*d.* per mile for first-class passengers in the cars between *Leith* and the *General Post Office, Edinburgh*. The defence was that under the Act of 1871 the company were not entitled to charge more than 1*d.* a mile; and that the Act of 1874 made no change as to the tramway cars. The Lord Ordinary (2) decided that "the highest rate which the company could charge on any part of their tramway system was 1*d.* per mile — a fraction of a mile beyond a complete mile being equivalent to a mile." The Inner House (Second Division) adhered (3), Lord *Gifford* declaring that "whatever may be the case with passengers using the omnibus routes, all other passengers using merely the tramways are entitled to do so, and are liable only in the fare of 1*d.* per mile or fraction of a mile, whether they travel inside or outside the tramway cars."

The company thereupon appealed to the House, having for their Counsel the Hon. Mr. *Thesiger*, Q.C., and Mr. *W. A. Hunter*.

The *Lord Advocate* (4), and Mr. *David Maclachlan*, appeared for the Respondent, but were not called upon.

At the close of the arguments on behalf of the Appellants, the following opinions were delivered:—

THE LORD CHANCELLOR (5):—

My Lords, I have seldom seen what appears to me a more unfounded action than that which was brought in the Court of Session in this case; and I certainly have never seen a more unfounded appeal. The opinion of the learned Judges in the Court of Session was unanimous, and was in accordance with the opinion of the Lord Ordinary, and I think your Lordships can entertain no doubt whatever that that opinion was entirely correct.

(1) The company contended that they were entitled under their Act of 1874 to charge 4*d.*, but only demanded the modified fare of 3*d.*

(2) Lord *Shand*.
(3) 4th Series, vol. iii. p. 655.
(4) The Right Hon. *W. Watson*.
(5) Lord *Cairns*.

H. L. (Sc.) 1877

EDINBURGH STREET TRAMWAYS COMPANY v. TORBAIN.

My Lords, in the year 1871 the *Edinburgh Street Tramways Company* obtained parliamentary authority for making a system of tramways in the city of *Edinburgh*, with the concurrence of the local bodies who were interested, and amongst others the corporation of *Edinburgh*, after distinct and formal agreements had been entered into with those parties. Those agreements were scheduled to the Act of Parliament, which declared them to have legislative authority.

I will call your Lordships' attention to one of those agreements, which may be taken as an example of them all. In the agreement with the corporation of *Edinburgh* there was a very clear and distinct stipulation with regard to the fares which the company was to be entitled to charge to passengers on these tramways. The 10th clause provided that

> In no case shall the company demand or take for any passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, tolls or charges exceeding in the whole 1*d.* for each mile, the fraction of a mile beyond an integral number of miles being for that purpose deemed a mile; but the company may charge for any less distance than two miles any sum not exceeding 2*d.*

The agreement is a very long one, and it is one obviously entered into for the public benefit of the city of *Edinburgh*, the corporation acting as the guardians thereof. The stipulation that I have read was one of those made in the interest of the public. There are a number of other similar stipulations with regard to the mode in which the works are to be conducted and in which they are to be maintained. There is a particular provision that the system of tramways which was agreed upon should be executed as a whole within a period of three years from the passing of the Act. And there are penalties for any breach of any term of this agreement. It was, of course, obviously necessary in the interests of the public, that the construction of the tramways of the city being handed over to a company of this kind, the company should not be left free to pick and choose afterwards what particular portion of the tramways it would execute, but should be held bound to the city to execute the work as a whole. Such, my Lords, was the agreement entered into with the corporation.

The Act of Parliament (1), by the 44th section, enacted that

> The agreements which respectively are set forth in the three schedules to this Act are hereby respectively confirmed and made part of this Act, and the same shall be carried into effect accordingly.

And in addition there was a clause in the Act itself which made very careful provision with regard to the fares to be charged. By the 38th clause it was enacted

> The company may demand and take for every passenger travelling upon any or either of the tramways or any part or parts thereof respectively, including tolls for the use of the tramway and of carriages, and for motive power, and every other expense incidental to such conveyance, any tolls or charges not exceeding 1*d.* per mile (and for this purpose the fraction of a mile beyond an integral number of miles shall be deemed a mile), but the company may charge for any less distance than three miles any sum not exceeding 3*d.*

Then, my Lords, there follows a very careful stipulation that if a certain number of inhabitants should represent that

> The company are charging a greater sum than 2*d.* for distances not exceeding two miles, and that, under the circumstances then existing, such charge is unreasonable,

the Board of Trade might be called upon to entertain and to declare whether that was an unreasonable charge by the company or not.

The whole of these provisions, my Lords, both those in the agreement and those in the Act of Parliament, point out in the clearest way that it was a paramount object, both with the Legislature and with the corporation as intervening before the Legislature, to tie the hands of this company, to whom a large and probably a lucrative undertaking was confided, against charging any fare which should be beyond the limit of fares provided by the Act and by the agreement.

My Lords, I pass over what took place in the year 1873, when Parliament authorized the time for the completion of the works to be extended, and I come to the year 1874. When one portion of the tramway system was found to be very difficult of construction, as we are told, by reason of the gradients—and of course it was a great object for the company to be relieved from that part of the undertaking which, as things then stood, they were absolutely bound to construct—they applied to Parliament for that purpose,

(1) 34 & 35 Vict. c. 89.

H. L. (Sc.) 1877

EDINBURGH STREET TRAMWAYS COMPANY v. TORBAIN.

and they stated in the preamble of the Act, which may be taken to be their representation to Parliament, that

By the second article of the agreement with the Corporation of *Edinburgh* it was provided, amongst other things, that the whole of the tramways authorized by the Act of 1871 should be completed within three years from the passing of the Act.

Then the preamble recited that

It is expedient that the company be authorized to abandon and relinquish the construction of the tramways and parts of tramways in this Act specified, and for the convenience of the residents in the districts in which such tramways are authorized to be laid, to run a service of omnibuses in lieu thereof.

The tramways in question were those between *Princes Street* and *Stockbridge* and *Trinity*. Those were the tramways specified in the Act which I am now referring to, and the statement of the Legislature is that the tramways company came as suppliants to the Legislature to be delivered from penalties to which they would be subject if they did not make these tramways in the specified time, offering, if they were allowed to be absolved from this obligation, to provide a service of omnibuses for the benefit of the public, who would thus be deprived of the benefit they had expected in the shape of tramways.

That, my Lords, was the condition of things before the legislation of 1874. The company came as humble suppliants to be delivered from obligations which they found were onerous, and, it may be, almost impracticable. In that state of things the Act of 1874 was passed. It dealt with other matters perfectly independent of that to which I am referring, such as the widening of the *North Bridge*, and things of that kind; but it had in it two sections, and only two, relating to these tramways which were to be abandoned, namely, the 3rd and the 4th. The 3rd section provided that the company might abandon and relinquish the construction of the tramways in question, which are numbered in a certain way, and that this benefit being conferred upon them, they were to pay in two instalments a gross sum of £3000 to the *Edinburgh Road Trust* as part of the compensation to the public for the indulgence they were to receive. Of course it was obvious that a large service of omnibuses thrown on the roads of a district might create, I suppose, wear and tear of the roads to a degree

that would require some compensation to be made, and therefore £3000 in two sums was to be paid to the *Edinburgh Road Trust.*

Then comes the provision with regard to the other equivalent for the release from the obligation of making tramways in the shape of what they had offered in the preamble to provide, namely, the omnibus service.

The company shall (by themselves or others) if and when required by the local authority of *Edinburgh*, by one month's notice in writing to that effect, provide good and sufficient conveyance by means of omnibuses,

between the points which are here indicated, to run a certain number of times in the day. And then comes this provision:

It shall be lawful for the said company to apply its funds from time to time for that purpose, or for purchasing omnibuses, horses, and premises for that purpose and demand

(I suppose that means "*to* demand")

and take in respect of passengers and parcels carried in or by such omnibuses such tolls and charges as they think fit, not exceeding the charges which, by the Act of 1871, the company are entitled to charge in the event of the construction of the tramways to *Stockbridge* and *Trinity*, and the company may charge a sum not exceeding 2*d.* per mile for first-class passengers on those routes and any tramway routes worked in connection therewith, and may also charge a sum not exceeding 1*d.* per mile for parcels by such omnibuses not exceeding 56 pounds in weight, and for parcels in excess thereof such charges as they may from time to time think fit: Provided, always, that the fares between *Stockbridge* and *Newington* by omnibus and car shall not exceed 3*d.* first class and 2*d.* second class for each passenger.

Then, my Lords, the 8th clause says that

Saving as is in this Act expressly provided, nothing in this Act shall prejudice or affect the three several agreements scheduled to the Act of 1871, but those agreements shall, subject to the provisions of the Act of 1873 and of this Act, remain in full force and effect.

Now, my Lords, the contention of the tramways company is this, that having come as suppliants to Parliament for permission to abandon the particular parts of the tramways which I have referred to, and having had put upon them the correlative obligation of supplying the public with an omnibus service over the part of the city where these tramways were abandoned, they induced the Legislature to put words into this clause which enable them, the tramways company, to double their fares over the whole system of tramways of the city of *Edinburgh;* those fares the

H. L. (Sc.) 1877

EDINBURGH STREET TRAMWAYS COMPANY v. TORBAIN.

limit of which was so carefully contracted for and so carefully legistated for by the agreement and by the Act of 1871. And, my Lords, the tramways company contend that this is no unreasonable construction which they ask to be put upon the section, for they say that, although the fares will be doubled, it will only be for first-class passengers, and there is an impression that some singular privileges are to be conferred upon first-class passengers, who in return are to pay for these privileges the double fares.

My Lords, there is not a trace in this section, or in any part of the Act, of any privileges being secured for first-class passengers. But your Lordships have heard at the Bar the view which the company take of those privileges. The passengers on the tramways were secured by the Act of 1871 the uniform privilege of being carried in proper and suitable cars, and were carried from that time forward in covered cars along the tramways; but the additional privileges which, according to the construction sought to be put by the tramways company upon the Act of 1874, are to be given to first-class passengers, turn out to be these, that all the passengers who up to that time were carried in the cars of the company are now, if they wish to be continued at the same fares, to be turned out of those cars and to be placed outside, and the first-class passengers are to be placed inside, paying double the amount for exactly the same accommodation which all the passengers previously received.

My Lords, I am not surprised that the Lord Justice Clerk treated this contest on the part of the tramways company as an audacious contest. It does appear to me to be the most violent construction that ever has been offered to be placed upon an Act of Parliament. It would require in the first place the clearest words to be inserted in the Act of 1874 before your Lordships could hold that that enactment had the effect of altering and breaking the contract made in 1871, and replacing it by an entirely new and different contract. It would require the clearest words to induce your Lordships, when you find a section which deals with nothing but the provisions of an omnibus service, to believe that in making that provision for an omnibus service between particular points, there was incidentally thrown in a clause which altered the rates, not in respect of that omnibus

service or of the points where it was to be conducted, but over the whole system of the tramways of the city.

But, my Lords, there is no ground, as it seems to me, upon the ordinary and legitimate principles of construction, putting aside altogether these *à priori* considerations, which can lead to the construction which the tramways company desire to put upon this clause. It is necessary, of course, in authorizing a statutory company to purchase and to run omnibuses to give them a power also to demand and take fares, and there is that power given in the section. They are to be entitled to demand and take fares, and then come these very distinct words, which appear to me to be the key of the whole of what follows:

> To demand and take in respect of passengers and parcels carried in or by such omnibuses, such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the company are entitled to charge in the event of the construction of the tramways to *Stockbridge* and *Trinity*.

I put aside for the present the reference to parcels. Here is an authority to demand and take in respect of passengers carried in or by such omnibuses, tolls and charges not exceeding those authorized by the Act of 1871. That appears to me to be the general and the governing power. What comes afterwards is an engrafting upon that of something which is not to have the effect of repealing what went before, but is to be read in conjunction and in harmony with what went before: "and the company may charge"—charge for what? Charge for some service; not charge irrespective of service; and for the service for which the charge is to be made, your Lordships upon all sound principles of construction are carried back to the introductory words at the commencement of the section; they are to charge "in respect of passengers" "carried in or by such omnibuses." Reading this section so, the company may charge in respect of passengers carried in or by such omnibuses, which in other words is, they may charge in respect of the omnibus service, "a sum not exceeding 2*d.* per mile for first-class passengers on those routes and any tramway routes worked in connection therewith;" that is to say, if there is omnibus service rendered or afforded to any person who is a passenger either upon the route to *Stockbridge* alone, or upon that route combined with any portion of any other tramway route, then in

H. L. (Sc.) 1877

EDINBURGH STREET TRAMWAYS COMPANY v. TORBAIN.

respect of the omnibus service the charge may be made of 2*d.* for a first-class passenger.

And, my Lords, that is made more emphatic, because when the sentence goes on to take up the question of parcels, those words which I have read into this intervening clause, or words which are exactly equivalent to them, are found in the clause with regard to parcels; for it runs thus "and may also charge a sum not exceeding 1*d.* per mile for parcels by such omnibuses not exceeding 56 pounds in weight," &c.

My Lords, reading it in this way you have a construction which is, I do not say merely in harmony with the general purport of the section, which is in harmony with all the *à priori* considerations applicable to the position in which these parties and the public stood, but which is in harmony with the first principles of construing a provision of this kind.

My Lords, although it did not appear to some of the learned Judges of the Court of Session (1) to be necessary to define the precise wording of the construction in this way, and they were contented with saying that the tramways company had not proved that they were entitled to make the charge which they had made, still upon this construction, or upon the principles upon which it is founded, the learned Judges of the Court below are entirely agreed. I submit to your Lordships that the case is one that cannot admit of any doubt whatever, and that this appeal, which is one of the most groundless I have ever known, ought to be dismissed with costs.

LORD HATHERLEY :—

My Lords, I scarcely think it necessary to add a word to what has fallen from my noble and learned friend on the woolsack, but I can state very briefly indeed what strikes me as the simple and plain construction of the whole clause, agreeing entirely with that which has been put upon it by my noble and learned friend.

The company not being able remuneratively to make the two tramroads in question, are discharged from the obligation of so doing by the Act. But then the Act takes care to provide for the public something as near as possible to the original design of the

(1) 4th Series, vol. iii. p. 655.

general scheme. Omnibuses are to be started to those places to which the tramways are to be abandoned, and the Legislature say, We will make this arrangement coincide as far as possible with the original scheme, and for that purpose the omnibuses shall start at the same hour, or rather at proper hours, to enable them to carry the public in exact accordance with the time which is fixed on the tramway portion of the system already existing. So that with regard to the system of tramways already existing it is provided with great care that the omnibus routes are to be worked in connection with it, and that the charges are not to be greater than they would have been upon the formerly authorized tramway system, and that the treatment of the passengers shall be throughout as nearly as possible in accordance with the treatment which would have existed if the tramway system alone had been in action.

But then it occurs to the Legislature with regard to the omnibuses that they are a different mode of conveyance from the cars on the tramways, and that there does exist a practice with regard to omnibuses which does not exist with regard to the tramways, namely, that of dividing the passengers into first and second class, arranged very simply by placing the first-class passengers inside and the second-class passengers outside. Therefore they make a provision that a first-class passenger may be made to pay a sum not exceeding 2*d.* a mile, and then those words are introduced which have led—I will not say to the difficulty, for I do not feel much difficulty about it, but to the contention; those words are that they shall pay 2*d.* per mile "on those routes" (that is, the routes of the omnibuses), "and any tramway routes worked in connection therewith." That is to say, though there has been as regards the tramways a provision in all the former Acts for a certain fare, and no mention of first and second class, and therefore it is to be understood that all passengers are to be carried at an equal fare, yet if you give the omnibus accommodation upon the omnibus portion of the route, you may make an additional charge in respect of that portion of the route, although the person travelling is going to continue his journey by the tramways; so far as that person uses the omnibus you may make an additional charge, although when he gets upon the tramway he will pay exactly what he did before. And the Legislature says, We take

H. L. (Sc.) 1877

EDINBURGH STREET TRAMWAYS COMPANY v. TORBAIN.

care both by the provisions of the 8th section and by the provisions of this 4th section also to say that we have no intention whatever to alter the position of those who use the tramways and the tramways alone.

My Lords, the suggestion of the tramways company in this case does appear to me upon the whole to be a most extraordinary one. Somebody or other (not any of those who are before us here to-day, I have no doubt) seems to have caught hold of these few words in the 4th section, and an attempt was made, which has been justly characterised—I do not feel it necessary to characterise it any further—to avail themselves of these few words in this section for a totally different purpose from that for which they were used, to impose a charge on passengers which appears to me to be quite contrary to the Act of 1871, and also to the Act of 1874.

LORD BLACKBURN :—

My Lords, I am entirely of the same opinion.

I quite agree that in construing an Act of Parliament we are to see what is the intention which the Legislature has expressed by the words; but then the words again are to be understood by looking at the subject-matter they are speaking of and the object of the Legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced. In the present case I think, as soon as we see what is the object of the Legislature and what they were talking about, there comes to be no difficulty at all. There has been a system of tramways authorized by Parliament throughout *Edinburgh* and partly constructed, in which it was carefully provided that all fares should be equal. There were not to be two classes, or anything of that sort. The promoters of the tramways afterwards came to Parliament for the purpose of being allowed to drop a part of their system, which they found it would be inexpedient to execute, and they were compelled to say that in lieu of that they would start and work omnibuses, and they required to have power given them to own omnibuses and to work them. The Legislature then had that as their general object and purpose. There is not a notion apparent

in the Act, nor apparent in the circumstances, of their ever proposing to grant to the tramways company the power to increase their maximum fares upon their tramways. Of course, if the Legislature had in express words, which there was no dispute about, said in this Act, We give the tramways company power to double their fares in future, or if they had said, We give them power to divide the tramway passengers in the car into two classes, and charge one of those classes double what they had been charged before, we must have said that they did intend to do it. But when they stopped short of that, and when we are construing an Act brought in for another purpose and dealing with another subject matter, I think it is not too much to say that the words to convince us that they had such an intention must be very clear indeed.

In the present case I feel no doubt or difficulty at all, having regard to one fact, and one fact only, which Lord *Neaves* mentions, namely, although in tramways there never were (such a thing was never heard of in these tramways) two classes, and although no power existed in the tramways company to divide the passengers into two classes, or to charge a higher rate for one set of passengers than for another set, I feel no doubt that the words "first-class passengers" must be read exactly as if it had said "passengers who travel in the inside of the omnibus in such a way that if they were in an ordinary omnibus they would be charged as first-class passengers."

If once you give that meaning to "first-class passengers" there is no difficulty at all occasioned by the Act. The Act then stands thus: after enabling the company to work omnibuses and to charge those who travel in the omnibuses (these are matters far from irrelevant in construing the section) it goes on thus: "And the company may charge a sum not exceeding 2*d.* per mile for first-class passengers on those routes" (that is, where the omnibuses are), "and any tramway route worked in connection therewith." If you read for "first-class passengers" "such passengers as travel inside the omnibuses" the clause reads thus: "to charge a sum not exceeding 2*d.* per mile for such passengers as travel inside the omnibuses on those routes and any tramway routes worked in connection therewith."

H. L. (Sc.) 1877

EDINBURGH STREET TRAMWAYS COMPANY v. TORBAIN.

Now, my Lords, all that has to be determined in the present case and all that comes before us here is, can that authorize a doubling of the fares on any portion of the passengers on the tramways only—on those passengers who never go in an omnibus? Therefore all that it is necessary to decide is what the Lord Justice Clerk says, and what I repeat, namely, "I am clearly of opinion that no one who does not use the omnibus service is bound to pay more than the old rate." That is all that is really before us and all that it is necessary to determine, and upon that I entertain no doubt at all.

My Lords, it was argued that we are bound to answer the question whether or no, when the Legislature said that the tramways company might charge 2*d.* per mile for "first-class passengers," meaning thereby passengers who had travelled or were going to travel inside an omnibus, they included those who should travel both on tramway routes and on omnibus routes; in other words, whether or no a passenger travelling in an omnibus all the way the omnibus went, and then getting out and going on by tram car, was, although he had been an inside or first-class passenger, to get off with a smaller fare. No such question has been raised before us, and perhaps it is not well to give an opinion upon a matter which is not brought judicially before us; but, *primâ facie*, one would say that the words were divisible, and that when the section says "first-class passengers on those" (omnibus) "routes and any tramway routes worked in connection therewith," it is to be read *reddendo singula singulis*, and as meaning either in whole or in part. But it is not necessary to say whether that is so or not. If the tramways company have, in framing their Act, worded it so as to deprive themselves of that advantage, I cannot help it. I can only repeat what Lord *Neaves* says: if

> In their anxiety to snatch what they were not entitled to they let go what they might have got, I have no sympathy with the tramways company, for they ought to have expressed their object and privileges clearly.

My Lords, upon the main question, the only question before us, I can entertain no doubt at all that the meaning of the Act is that no one who does not use the omnibus service is bound to pay more than the old rate. I must express my agreement with what has been said by both my noble and learned friends who have

spoken before me, that a more unfounded appeal than this has never been brought before the House.

LORD GORDON:—

My Lords, the question arises in reference to a passenger using the tramway from *Leith* to *Edinburgh*, or *vice versâ*. He had no occasion to use the omnibus, and suddenly he finds out that he is called upon to pay 2*d*. per mile in spite of the provision so very anxiously made in the parliamentary agreement that there should not be a higher charge than 1*d*. per mile. In the summons it is said that those who are "first-class passengers" are to pay 2*d*. per mile. We have no definition of what constitutes a "first-class passenger." I suppose it is possible that the tramways company, in fact, intended to give better accommodation to first-class passengers; but of that we have no judicial statement whatever, and I apprehend, therefore, that "first-class passenger" really means the passenger who pays double the parliamentary fare—that is to say, 2*d*. a mile in place of 1*d*. That constitutes, I suppose, what the tramways company really considered as a first-class passenger. Now, that is depriving the public of the option of travelling at 1*d*. per mile. It is quite true that they may get some additional privileges if they pay 2*d*. per mile, but that is not left to the option of the traveller. He may find it, according to the state of the weather, to be much more agreeable at certain times to travel outside than inside, and at other times inside than outside. He is deprived of this option by what is sought to be established by this declarator. I am quite of opinion that the Legislature never intended to place any such restriction upon the public, for whom they had provided so anxiously in the Act of 1871.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Agents for the Appellants: *Ashurst, Morris, Crisp, & Co.*
Agents for the Respondent: *Simson, Wakeford, & Simson.*

[HOUSE OF LORDS.]]

H. L. (Sc.) 1877 July 20.

STEEL *et al.* . . . . . APPELLANTS;

THE STATE LINE STEAMSHIP COMPANY RESPONDENTS.

Ship—Special Bill of Lading—Implied Warranty of Seaworthiness—Question for Jury—Precedent Condition.

6QBD690
8TD61-4
10QBD523
9PD21

Where special clauses in a bill of lading exonerate the shipowner from the liability of even the perils induced by the negligence of his servants, it is necessary that the jury should find whether the vessel was or was not seaworthy when starting on the voyage.

A cargo of wheat was shipped at the port of *New York* for conveyance to *Glasgow*, and a specially worded bill of lading contained clauses excepting "peril of the seas of whatever nature or kind soever and howsoever caused," including negligence of the crew. On the voyage the sea burst through an insufficiently fastened port-hole, damaging the cargo. A jury found by special verdict that this port-hole had been insufficiently fastened, but did not find whether this happened before starting on the voyage. The Court below entered up judgment for the shipowners. On appeal:—

Held, that there was an implied engagement to supply a seaworthy ship:

Held, also, that the jury not having found whether the vessel started on her voyage in a seaworthy condition, there was no finding before the House for judgment to be entered; therefore the case must be re-heard in the Court below.

Per THE LORD CHANCELLOR (1):—There is in the bill of lading an engagement that the ship shall be seaworthy.

Per THE LORD CHANCELLOR:—Whether the ship was seaworthy was a question of fact which lay at the very root of this case; but no answer to this question was found in the special verdict; therefore there is no finding on which the judgment can be entered either way.

Per LORD O'HAGAN:—A shipowner who accepts goods, which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy.

Per LORD SELBORNE:—All the perils which are excepted are perils subsequent to the loading of the wheat on board.

BY bill of lading dated at *New York*, on the 31st of August, 1875, it appeared that upwards of 15,400 bushels of wheat were shipped "in good order and condition" in the steamship called the *State of Virginia*, lying in the port of *New York*, and bound for *Glasgow*.

(1) Lord *Cairns*.

The bill of lading, after the usual stipulations to deliver the wheat in good order and condition, proceeded as follows:

Not accountable for leakage, breakage . . . however caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise: namely, risk of craft or hulk, or transhipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequence of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and however caused, excepted.

On the *State of Virginia* arriving at *Glasgow*, it was found that the wheat had been damaged by sea water to the value of £2793 4*s*. 6*d*. The Respondents, owners of the *State of Virginia*, refused to pay this sum to the Appellants, the onerous indorsees of the bill of lading; contending that they were exonerated from all liability by the wording of the bill of lading.

The case was heard before Lord *Young* and a jury on the 24th of January, 1877, when a special verdict was returned as follows:

That through the negligence of some of the crew one of the orlop deck ports of the said steam-ship was insufficiently fastened, and that in consequence the said sea water was thereby admitted to the hold after the ship had been five days at sea. Find, that, as the ship was loaded, the said port was situated about a foot above the water-line, and that if properly fastened by means of the screws thereto attached, the said port would have been watertight throughout the voyage. Find, that the said sea-water was not admitted to the hold until the morning of the 6th of September, and that for the first seven days of the voyage the weather encountered was substantially as set forth in the mate's log.

The jury reserved to the Court to enter up the verdict for the Pursuers or Defenders, as the Court in the exercise of their judgment should determine. The Court of Session, First Division, entered up the verdict on the 16th of March, 1877, in favour of the Defenders (1), the above Respondents.

Against this decision the Pursuers appealed to the House.

Mr. *Benjamin*, Q.C., and Mr. *Watkin Williams*, Q.C., were heard for the Appellants, contending that the verdict should have been entered up for them, because the Respondent's vessel was not when she started on her voyage in a reasonably fit condition, as

(1) Scotch Cases, 4th Series, vol. iv. p. 657.

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

regarded the cargo of grain, to encounter the ordinary perils of a voyage from *New York* to *Glasgow;* and the damage caused to the Appellants was caused by that unfitness. The question was, Were the Respondents discharged from the liability involved by the vessel leaving *New York* with a port-hole insufficiently fastened? There was thrown on the shipowner a direct obligation to supply a seaworthy ship: *Gibson* v. *Small* (1). The *State of Virginia*, owing to the unfastened port-hole, could not be said to be seaworthy. The extraordinary bill of lading might have protected the Respondents, provided the ship was right at starting. It was admitted that if the port-hole had been fastened at starting, and that afterwards one of the crew had unfastened it, they could not say that they would have had a right to a verdict. The negligence occurred before the goods were on board. It was decided in *Gleadell* v. *Thomson* (2) that exceptions in the bill of lading only relate to negligence occurring while the goods were on the vessel. The clause in the bill of lading in the present case relating to negligence could not be connected with the clause relating to perils of the sea. A responsibility was cast upon the shipowner to furnish a ship fit to carry the cargo the charterers had undertaken to put on board: *Stanton* v. *Richardson* (3); *Daniels* v. *Harris* (4). In every contract for the conveyance of merchandise by sea there was, in the absence of express provisions to the contrary, an implied warranty by the shipowner that his vessel should be seaworthy: *Kopitoff* v. *Wilson* (5). The question of fact whether going to sea with this port-hole open was going to sea in an unseaworthy condition was not found by the jury; but the jury did expressly find that the port-hole had been insufficiently fastened. The damage was not caused by a peril of the sea, but by unseaworthiness. A case bearing on this point was *The Merchant Trading Company* v. *The Universal Marine Insurance Company* (6), in which case the jury were asked, was the leak from which the vessel foundered attributable to injury and violence without, or from weakness from within? if the latter, it was unseaworthiness. Although the important fact as to seaworthiness was not found by

(1) 4 H. L. C. 298, 404.
(2) 56 New York Rep. 194.
(3) 7 C. P. 431; 9 C. P. 390.
(4) Law Rep. 10 C. P. 1.
(5) 1 Q. B. D. 377.
(6) 9 Q. B. 596.

the jury, yet it was plain the Respondents had not fulfilled their contract, they not having delivered the wheat in good condition.

Mr. *Cohen*, Q.C., and Mr. *Mathew*, for the Respondents, admitted that there might not be sufficient matter before the House to come to a decision; but they contended that no breach of the special bill of lading had been committed. The shipowner who stipulated for exemption from losses by perils of the sea would be liable for such a loss as had occurred here, when caused by the negligence of the crew, if there was no express provision to the contrary; but here there was an express exemption from liability. There was a distinction between contracts of insurance and of affreightment: *Grill* v. *The Iron General Colliery Company* (1). As to the case of *The Merchant Trading Company* v. *The Universal Marine Insurance Company* (2), there the vessel must have been unseaworthy, as she sank in a few minutes and in fine weather. It was quite different in this case. The bill of lading covered risks by way of exception, some of which might occur in the loading of the cargo. The loss here was occasioned, either by a peril of the sea, or from the negligence of some of the crew, or from both combined, and from all these the Respondents were excepted from liability by the special clauses of the bill of lading (3).

Mr. *Cohen*:—My Lords, my learned friend, Mr. *Benjamin*, says, that after the opinion expressed by your Lordships as to the jury not having found the question of fact as to seaworthiness, he will not contend that he can be entitled to a judgment on the finding of the jury now before the House.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (4):—

My Lords, your Lordships have had the advantage in this case of a long and interesting argument upon points which are no

(1) 1 C. P. 612; 3 C. P. (Ex.) 476.

(2) 9 Q. B. 596.

(3) The following cases were also cited at the Bar:—*Taubman* v. *Pacific Steam Navigation Company*, 26 L. T. 704; *Carr* v. *Lancashire and Yorkshire Railway Company*, 21 L. J. (Ex.) 261; *Kay* v. *Wheeler*, 2 C. P. 302.

(4) Lord *Cairns*.

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

doubt of great commercial importance. There is some difficulty in the case by reason of the course which it has taken in the Court below; but I think when your Lordships consider the whole of the facts, so far as they appear, and the argument which you have heard, there cannot be much doubt as to the result at which we should now arrive.

The question arises upon the shipment of a considerable quantity of wheat at *New York* in one of the State Line steamers. The present Appellants are the indorsees of the bill of lading; but, having regard to the provisions of the *Bills of Lading Act* (1), they are onerous indorsees, and they stand in the position of the original shippers; they have whatever right of action the original shippers had, and I may speak of them as if in point of fact they had been the shippers of the wheat.

Now, my Lords, on the shipment of the wheat a bill of lading was given; and I will in the first place direct your Lordships' attention to that bill of lading. It contains an affirmative portion, and also a portion which we may call a negative portion, or rather a portion which by way of exception and curtailment of some antecedent liability, created by the earlier part of the bill of lading, endeavours to protect the shipowners from certain consequences. The affirmative part of the bill of lading states that the wheat in question

> Has been shipped in good order and condition, and is to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition at the port of *Glasgow*.

It is an engagement, therefore, to carry and to deliver at a certain port in this kingdom the wheat so shipped. What is the meaning of the contract created by those words supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is sea-

(1) 18 & 19 Vict. c. 111, s. 1.

worthy. By "*seaworthy*," my Lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the *Atlantic*. My Lords, if there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract.

I took the liberty of asking the learned counsel for the Respondents whether they were prepared to say that if the owner of goods engaged room in a ship of this kind, and, bringing his goods alongside, at the time the ship was ready for departure, found that the ship was not seaworthy, he could not refuse the fulfilment of his promise to put his goods on board, and whether, on the other hand, he could not maintain proceedings against the owner of the ship for not having accommodation for his goods in a ship that was fit to carry them.

I did not understand the learned counsel for the Respondents to be able to say that that was not the relative position of the owner of the goods and the shipowner; that on the one hand the owner of the goods was not entitled to refuse to put his goods on board, and on the other hand the owner of the ship did not incur liability by not having a ship fit to fulfil the engagement he had entered into. But, my Lords, if that is so, it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no doubt that this would be the meaning of the contract; but it appears to me that the question is really concluded by authority. It is sufficient to refer to the case of *Lyon* v. *Mells*, in the Court of Queen's Bench during the time of Lord *Ellenborough* (1), and to the very strong and extremely well considered expression of the law which fell from the late Lord *Wensleydale* when he was a Judge of the Court of Exchequer, and was advising your Lordships' House in the case of *Gibson* v. *Small* (2).

My Lords, that being, as I submit to your Lordships, the effect of the earlier part of the bill of lading, it then becomes material

(1) 5 East, 428.

(2) 4 H. L. C. 395.

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

to consider what is the effect of the later part, the qualified or exceptional part of the bill of lading. It is not very happily expressed as regards its grammar and the collocation; but I will assume in favour of the Respondents that everything which is mentioned between the words "not responsible" and the word "excepted" is meant to be matter in respect of which there is to be no liability on the part of the shipowner. But, looking at all that is mentioned between those two termini in the bill of lading, it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board. There is mentioned there the bursting of bags, "the following perils" "risks of craft or hulk," which was found by the verdict which I shall afterwards have to refer to, not to mean the risk of the ship herself—

> Transhipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and however caused, excepted.

My Lords, the only attempt to give to any of these words a meaning which would refer them to what happened antecedent to or at the time of the departure of the ship, was to construe the words "peril of the seas" "howsoever caused" so as to make them point to unseaworthiness ending in a loss at sea. But it appears to me obvious that what is here referred to as peril of the seas is, as described, something which happens on the transit, whether land or sea transit, and that of course does not commence until the ship leaves the port. Therefore if it be the case, as I submit to your Lordships it is, that there is in the earlier part of the bill of lading an engagement that the ship shall be reasonably fit to perform the service which she undertakes, there is in my opinion nothing in the later part of the bill of lading which qualifies that engagement.

Now, my Lords, that being the view of the construction of the bill of lading which I shall submit to your Lordships, let me proceed to apply it to what is found to have occurred in the present case. With regard to the pleadings, there is a statement in the 5th article of the Appellant's condescendence that—

> When the said vessel left *New York* she was not in a seaworthy condition in

respect that one of her side ports was open, or, at least, not sufficiently secured or fastened to prevent the influx of water into the hold; and the said port was allowed to remain open or insecurely fastened through the gross carelessness of those in charge of the vessel, and the result was that water flowed into the hold through the said port, and so little care was taken of the cargo that there were about fifteen feet of water in the hold before the fact of the leakage was discovered.

It is the damage done to the wheat in consequence of this influx of water which forms the subject of complaint in the action. There is a denial to that, but it is explained that on the 6th of September, when the ship was about 1100 miles from *New York*, one of her side ports was burst open to some extent by the heavy seas which she encountered, and water flowed into the hold through said port. My Lords, that will shew your Lordships sufficiently the character of the allegation on the one side and on the other on that point, and to that I may add in the statement on the part of the Defender it is said, "When the said vessel sailed from *New York* on the said voyage, she was seaworthy," and to that there is a denial that the "vessel" "was seaworthy when she sailed from *New York*." There is one other statement to which I will refer in the condescendence, but upon the general averment and denial, the first plea in law for the Pursuers before the additional pleas was this:

The Pursuers having sustained loss and damage to the extent foresaid, through the unseaworthiness of the Defenders' vessel, and the failure of the Defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for, with interest and expenses.

My Lords, the case came on for a jury trial in *Scotland*, and the jury found on the issue, which I need not refer to, particularly a special verdict, and that special verdict finds first the shipment of the wheat

"To be conveyed" in terms of the bill of lading set out in the schedule. Finds then that the wheat was carried to *Glasgow*, and delivered to the Pursuers, who are onerous indorsees of the bill of lading. Then finds that when delivered it was not in the like good order and condition in which it was shipped.

Then it finds as follows:

That through the negligence of some of the crew one of the orlop deck ports of the said steam-ship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea. Find, that, as the ship was loaded, the said port was situated about a

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

foot above the water-line, and that if properly fastened by means of the screws thereto attached, the said port would have been watertight throughout the voyage. Find, that the said sea-water was not admitted to the hold until the morning of the 6th September, and that for the first seven days of the voyage the weather encountered was substantially as set forth in the mate's log.

which forms part of the process. And then it finds that if there is damage to be recovered it is of a certain amount.

Now, my Lords, looking to this special verdict, and looking to that alone, for the facts with which we have to deal, it appears to me that if our attention was confined merely to that special verdict there would be very great incertitude and ambiguity as to what the facts really were. There is mention of a port-hole which at the time the ship sailed was a foot above the water-line. It is stated that there were screws attached to the port-hole by which it could be fastened, and that when fastened by means of those screws, the ship would have been watertight throughout the voyage. It is found that the port-hole was insufficiently fastened, but when and at what time is not stated in the special verdict. Consistently with this special verdict it may well have been that either of two states of things occurred. Consistently with this verdict it might have been that there was no want of fastening the port-hole when the ship sailed, that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and if so, probably that would be a matter which would be covered by the exceptions in the bill of lading as a case of negligence occurring during the transit of the goods. Or it may be, that if the port-hole (still looking at this verdict alone) was unfastened at the time of the sailing of the ship, the port-hole may have been so situated and the access to the port-hole such as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken. On the other hand, there is a passage in the condescendence, which if it could be taken along with the special verdict might raise at all events a suspicion, which in various minds might be more or less strong, that the state of things with reference to this port-hole at

the time the ship sailed was such as that the state of the port-hole constituted a degree of unseaworthiness which could not at any moment, without considerable trouble, have been got rid of.

My Lords, the passage to which I refer is this. In the condescendence on behalf of the Defenders in the action in the 6th number it is said :

> It was the duty of the master and company of the vessel to see that the said port was properly fastened before the voyage began, and that it was not interfered with thereafter. The Defenders have made every inquiry, but have been hitherto unable to discover the cause of the said side port not resisting the pressure of the seas. The Defenders' information is, and they aver, that the master and crew of said steamer did use reasonable care to secure and keep secure said side-port, notwithstanding which, or from the negligence, default, or error in judgment of the master, mariners, or other persons in the service of the ship $\frac{\text{and}}{\text{or}}$ employed in the stowage of the cargo at *New York*, for whom the Defenders in the absence of stipulation to the contrary would be responsible, the particular person in fault being to the Defenders unknown, the port before mentioned in the course of the voyage, from the perils of the sea or navigation, was burst partly open as before mentioned, and the damage alleged by the Pursuers happened to the wheat.

and then follows this statement :

> After the cargo was loaded the inside face of the said port could not be seen or got at without taking out the cargo.

Now, my Lords, whether the ship at the time she left *New York* was or was not in a condition fit to perform the service which she had undertaken with reference to these goods—whether she was or was not "seaworthy" in the sense in which I have used that term, was a question of fact, and in the view which I have taken of the construction of the bill of lading, it was a question of fact which lies at the very root of this case. But your Lordships do not find in the special verdict, as I read it, any answer whatever to that question of fact. And, my Lords, although the Court in *Scotland* thought themselves able to apply the verdict and to enter upon it a judgment for the Defenders, and although the Appellants in the first instance asked your Lordships here to reverse that judgment and to enter a judgment for them, I think it has come to be admitted in argument on both sides, that if the construction of the bill of lading be such as I have submitted to your Lordships it is, there is not here now any finding upon the question of fact whether the ship was or was not seaworthy upon which judgment can be entered either way. Therefore I fear, although

H. L. (Sc.) 1877

STEEL v. STATE LINE STEAMSHIP COMPANY.

I regret the result, that nothing can be done by your Lordships now but to remit this case to the Court of Session in *Scotland*, and to direct that a new trial shall be had.

On the occasion of that new trial it appears to me that it will be the duty of the learned Judge who conducts it to obtain from the jury an answer to this question of fact, to direct the jury's attention to those circumstances to which I have referred, and to whatever evidence may be given with reference to those circumstances, and to obtain from the jury an expression of opinion as to whether the ship at the time she left *New York* was seaworthy in the sense in which I have used the term; of course in arriving at that conclusion the precise and accurate consideration of the state of this port will become very material. It may, on the one hand, be that the port, if open when she left *New York*, was not occasioning any danger whatever to the ship so long as calm or moderate weather prevailed, and it may be that the port was so circumstanced that, upon any approaching change of weather, it might immediately have been closed and fastened down; or it may be, on the other hand, that the cargo was so loaded that, the fastenings of the port being from the inside, those fastenings were covered over by the cargo and rendered inaccessible, or rendered at all events inaccessible without such a removal or change of the cargo as would occupy a considerable time, and could not conveniently take place when the ship was at sea. Those are questions to which the attention of the jury should be directed in order that they may say, after considering those matters, whether the ship at the time she left was in fact in a condition reasonably to perform the service of the conveyance of these goods without danger.

My Lords, the judgment of the Court of Session has been a unanimous judgment, but I do not see that in point of fact there was any opinion expressed by the learned Judges in that judgment which is at variance with the law as I understand it, and as I have endeavoured to submit it to your Lordships. What I mean is this: I do not understand that any of those learned Judges would have said that if the question is, what is the construction of the affirmative part of this bill of lading they would have placed that construction on any other footing than I have endeavoured to place it. But what it appears to me was the error, if I may respectfully

say so, of those very learned persons was this, that although at one part of the judgment they appear to recognise the construction which I have mentioned of the earlier part of the bill of lading, they seem afterwards to have been entirely occupied with the other part of the bill of lading—with the exceptions in it—and to have assumed that those exceptions would be sufficient to wipe out or to destroy what was the stipulation in the earlier part of the bill of lading.

My Lords, I say that for this reason I find that the Lord President, in the earlier part of his judgment (1), expressed himself thus:

> I think it is conceded on the part of the shipowners, the Defenders here, that the object of this clause was to save them from all liability implied in the obligation to deliver in like good order and condition, except a liability which might arise from the unseaworthiness of the vessel. If they provided a seaworthy ship, tight, staunch and strong, well-manned and equipped for the carriage of goods, they say that, in consequence of the manner in which the clause of excepted risks is conceived, they are free from all other liability.

I understand the Lord President to recognise and to approve of that which he calls a concession in argument on the part of the shipowners, and I understand it to be a statement by the Lord President that the shipowners were bound to provide a

> Seaworthy ship, tight, staunch, and strong, well-manned and equipped for the the carriage of goods.

And, my Lords, that is simply the proposition which I have submitted to your Lordships to be correct in point of law. I do not understand that any of the learned Judges differed from that proposition, and I again say it appears to me that the only miscarriage which took place was that, having so laid down their view of the law, they did not apply it correctly with reference to the verdict which they had before them and with reference to the exceptions in the bill of lading.

My Lords, I submit therefore to your Lordships that this appeal must be allowed to the extent of reversing the interlocutor of the Court of Session and remitting the case with a declaration that there ought to be a new trial of the case.

(1) Scotch Cases 4th Series, vol. iv. p. 659.

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

LORD O'HAGAN:—

My Lords, I completely concur in the observations of my noble and learned friend, and I do not desire to add anything to the precise and lucid words in which he has conveyed the conclusions at which I believe your Lordships have arrived. Those conclusions result in keeping this case still pending. It will have to go before a Judge and a jury; and I think it more fitting and becoming in such circumstances not to anticipate or affect the inquiry by any unnecessary words.

I shall only say that I entirely concur in the view that a shipowner who accepts goods which he is to deliver in good order and condition, impliedly contracts to perform the voyage in a ship which is seaworthy. The most persuasive reason, and the most conclusive authority, combine to establish that which appears to me to be a very plain proposition. In the second place, I have no doubt myself that the words of exception which are contained in the bill of lading in no degree denude the shipowner in this case from the liability so created. There remains a question of fact, which is not in any decisive or unequivocal way determined by the special verdict in this case. It is, therefore, unfortunately necessary that the case should go back, and I entirely approve of the proposal made by my noble and learned friend.

LORD SELBORNE:—

My Lords, I entirely agree with my noble and learned friends who have preceded me as to the law to be applied to this case, and also as to the construction of the bill of lading.

It was suggested by Mr. *Mathew* in his able argument, that the bill of lading covered risks by way of exception, some of which might occur during the loading of the cargo on board and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear on the face of the bill of lading that it represents the goods as already shipped. It is given in duplicate in the ordinary course, and I also find that it is expressly stated by the Pursuers in their condescendence that the wheat had been loaded on board the ship before and on the day which is the date of the bill of lading. I therefore quite agree that all

the perils which are excepted are perils subsequent to the loading of the wheat on board the ship, and that they are capable of, and ought to receive a construction, not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken.

My Lords, I also concur as to the course which it is necessary for your Lordships to take, and in the statement which has been made of the nature of the questions which will have to be investigated when the new jury trial takes place. Of course nothing that is said or done by your Lordships now will preclude the examination of the case upon the evidence at the new trial upon the substance of it. No words which may have been uttered by my noble and learned friends, or I think by any of your Lordships, were intended or can be taken to indicate any foregone conclusion as to facts not now before us. But we all agree that, looking to the issues raised, and to the nature of the special verdict, those things are not found by the special verdict which are necessary for the satisfactory determination of the case.

My Lords, my noble and learned friend on the woolsack has submitted his views of the opinions given in the Court of Session. I must own mine is upon that point not precisely the same with that of my noble and learned friend. It seems to me from the language, particularly of the Lord President and of Lord *Shand*, that the course which the case really took in the Court of Session was this. It was assumed by those learned Lords, and I should think by all the Lords, that the contract of the shipowner was to provide "a seaworthy ship, tight, staunch, and strong, well-manned and equipped for the carriage of the goods," and that if he did not do that there was nothing (I should so read the judgments) in the exceptions in the bill of lading to relieve him from that liability. But what I should myself collect is, that the learned Judges, applying themselves to the special verdict alone, and dealing with the case as if they had nothing to do but necessarily to enter a judgment for the one party or the other, found the special verdict to be insufficient to raise a case of anything more than negligence, default, or error in judgment on the part of the pilot, master, or persons in the service of the ship; and, as consistently with the special verdict, that might have been during the course of the

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

voyage, and was not found otherwise, I should conjecture that the learned Lords thought that the *onus probandi* upon that point lay with the Pursuers and not upon the Defenders; and on that ground entered the judgment in the Defenders' favour. Of course, my Lords, I agree with what has been said that that is not a satisfactory or a proper way of dealing with the case, where the special verdict does not really find the material fact npon which the whole question turns.

LORD BLACKBURN:—

My Lords, I entirely agree in the course which is proposed to be taken, of sending the case down for a new trial, on the ground that this special verdict does not really find the cardinal fact upon which it depends whether the judgment ought to be for the Respondents or for the Appellants.

I take it my Lords, to be quite clear, both in *England* and in *Scotland*, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of Lord *Tenterden*, as early as the first edition of *Abbott* on Shipping, at the very beginning of this century, of Lord *Ellenborough*, following him, and of Baron *Parke*, also, in the case of *Gibson* v. *Small* (1), without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of about forty or fifty years. I think therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship.

In the case of *Readhead* v. *The Midland Railway Company* (2), which was the case of a contract to carry passengers upon land,

(1) 4 H. L. C. 353. (2) Law Rep. 4 Q. B. 379.

there had been a good deal of reasoning in the Exchequer Chamber to the effect that the obligation there was not to furnish a carriage which was absolutely perfect or landworthy, but only to furnish a carriage which was fit as far as they could reasonably make it, which is a different kind of contract from what is now supposed. In the case of *Kopitoff* v. *Wilson* (1), where I had directed the jury that there was an obligation, I did certainly conceive the law to be, that the shipowner in such a case warranted the fitness of his ship when she sailed, and not merely that he had loyally, honestly, and *bonâ fide* endeavoured to make her fit. The Court, when it came to be considered, had to see whether that did not clash with the reasoning in *Readhead* v. *The Midland Railway Company* (2), and we all agreed that it was immaterial to decide whether it did or not, because there was nothing in that case to raise the question whether it was an absolute warranty, or merely a duty to furnish it as far as could properly be done. Nor, in truth, do I think that here that question would, in all probability really arise, for here if there was such a defect as would make the ship not reasonably fit to carry the wheat across the *Atlantic*, there can be no doubt that it must have been owing to negligence on the part of the shipowners or some of their servants, and cannot be said to have arisen from that kind of latent defect which no prudence or skill could perceive.

Now, my Lords, taking that to be so, it is settled that in a contract where there are excepted clauses, a contract to carry the goods except the perils of the seas, and except breakage and except leakage, it has been decided both in *England* and *Scotland*, that there still remains a duty upon the shipowner, not merely to carry the goods if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods and shall not be negligent. That has been determined in several cases, of which *Phillips* v. *Clark* (3) is the leading one, and that decision has been followed in many cases. In the case of *Moes* v. *The Leith and Amsterdam Shipping Company* (4), decided in *Scotland*, the same thing seems to have been deter-

(1) 1 Q. B. D. 377.
(2) Law Rep. 4 Q. B. 379.
(3) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.
(4) 5 Macph. 988; 39 Scot. Jur. 546.

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

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mined, namely, that where there is such an exception if the shipowner or his servants are guilty of negligence producing the misfortune, they are liable on that account. I think myself that the proper and right way of enunciating it would be, in such a case, to say if owing to the negligence of the crew the ship sinks while at sea, although the things perish by a peril of the sea, still inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. It matters not whether that would be the right mode of expressing it or not, that is clearly established. They may protect themselves against that, and they do so in many cases, by saying, these perils are to be excepted, whether caused by negligence of the ship's crew, or the shipowner's servants, or not. When they do so, of course that no longer applies.

My Lords, I think that exactly the same considerations would arise here as to the implied duty—the duty which, though not expressly mentioned, arises by implication of law—on the part of the shipowner to furnish a ship really fit for the purpose. If that duty is neglected, as in the case of *Kopitoff* v. *Wilson* (1), or as in the case here, as it is alleged—I do not say that it is so, because that is a point not yet determined—the shipowner is liable. If, as is alleged here, a port gives way and the seas come in and wet the wheat, and if it is a consequence of the ship having started unfit that that mischief is produced, it seems to me to be exactly like the case of *Phillips* v. *Clark* (2), where negligence, not provided for by the contract, occasioned the breakage or the leakage, which it was said was an exception, but which the Court determined was not an exception of which the shipowners could avail themselves, seeing that it was brought about by their negligence. So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.

Now, my Lords, I perfectly agree with what has been said by the noble and learned Lords who have already addressed you on

(1) 1 Q. B D. 377. (2) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

the construction of this contract, that it does not provide at all for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated, if they had pleased (I know no law that would hinder them), We will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship, that is your look-out; you shall not have any remedy against us if we do. I say they might have so contracted, and perhaps in some cases they may actually so contract. I do not know. Or the shipowner might, and that would have been more reasonable, have said, I will furnish a seaworthy ship, but I stipulate that although the ship is seaworthy, and although I have furnished it, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy; and I will protect myself against any perils of the seas, though the loss should be produced in consequence of, or caused by, that unseaworthiness. They *might* have contracted in that way. I think that when this contract is fairly looked at it appears that they do not so contract as to apply it to this case. I think, and I agree there with the Court of Session (1), that they have here sufficiently expressed in the contract they will not be responsible or answerable for the consequences of a loss by perils of the seas or either of the excepted perils, even though it may be produced by the negligence of the mariners. I think that they have done that, and that is what the Court of Session appear to have thought was all that it was necessary to say.

But then, my Lords, for some reasons or other, I cannot exactly make out what, the Court below lost sight of the fact that if there was a want of seaworthiness in the ship—using the common phrase which is used as meaning if the duty or obligation to make the ship reasonably fit for the voyage had not been fulfilled—if there was a want of seaworthiness in that sense, and that want of seaworthiness caused the loss, this contract did not protect the shipowners, and therefore it was incumbent upon them to see whether there was a want of seaworthiness, and whether it did produce the loss. The point was raised on the first plea in law distinctly, and then there were several additional pleas in law in which

(1) 4th Series, vol. iv. p. 660.

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

it was not raised, and it seems to have been lost sight of; and though the issue directed was so worded as to leave this open, it is so worded as to lead me to think that those who drew the issue were not thinking of this point (no doubt it would be open upon the issue, but it is not raised by it), and when there came to be a special verdict, it was found that

> One of the orlop deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea water was thereby admitted to the hold after the ship had been five days at sea.

And then it was found that this port was about a foot above the water-line, and that the weather had been as is described in the mate's log.

Now, my Lords, I cannot see that this special verdict finds, either one way or the other, whether or no there was a want of seaworthiness or reasonable fitness to encounter the ordinary perils of the voyage or not. I think that is left quite ambiguous and uncertain. I quite agree with what has been said, that it was a question of fact for the jury, whether or no the vessel was made reasonably fit to encounter these ordinary perils.

I think also that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the *Atlantic*. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but

quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or Judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. If they did not put it right after such a warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship. But between these two extremes, which seem to me to be self-evident cases as to what they would be, there may be a great deal of difficulty in ascertaining how it was here. It may very likely be a contested point as to how far the wheat was put against this port. That may be one of the contests, and there may be many others. I agree with what has been already said, that nothing which is said now about unseaworthiness is at all authoritative. Of course it is not laying down the opinion of the House, but what I have said is not even the expression of a final and concluded opinion formed by myself as an individual advising your Lordships. I merely express it as being what I think might be the case.

I have no doubt what the result will be; it will be a question, taking the whole circumstances together, was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon the whole circumstances and the whole of the evidence. I have merely indicated two extreme cases which I think are quite possible, and in one of which I think it is quite clear that nobody would say she was seaworthy; in the other case I think any one would say she was seaworthy. These are only two extreme cases—there must be plenty of room for dispute between the two. That being so, my Lords, the special verdict not stating enough to enable us to determine that cardinal fact upon which in my mind it depends, whether the Appellants or the Respondents are entitled to judgment, I think it is impossible to decide either way, and consequently

H. L. (Sc.) 1877 STEEL v. STATE LINE STEAMSHIP COMPANY.

the case must be remitted to the Court of Session to ascertain in such a way as they have the means of ascertaining (a new trial is the only course which occurs to me) whether or no the ship was seaworthy at the time she sailed, and whether the loss was occasioned by the want of seaworthiness, if such want there was.

LORD GORDON:—

My Lords, I quite concur with the views expressed by the noble and learned Lords who have preceded me. I think that it is quite impossible for your Lordships to dispose of this case upon the evidence afforded by the verdict of the jury.

It is curious, indeed, as Mr. *Benjamin* observed in opening the case, that in the very first plea in law this question of unseaworthiness, as affording a ground of claim against the Defenders, was stated in the inferior Court.

> The Pursuers having sustained loss and damage to the extent foresaid, through the unseaworthiness of the Defenders' vessel, and the failure of the Defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for with interest and expenses.

And the very last plea in the case for the Appellants, which I see is signed by Mr. *Benjamin*, resumes this plea in the inferior Court, and sets forth that the interlocutor should be reversed

> Because the Respondents' vessel was not when she started on her voyage in a reasonably fit condition as regards a cargo of grain to encounter the ordinary perils of a voyage from *New York* to *Glasgow*, and the damage caused to the Appellants was caused by that unfitness.

Unfortunately the advisers of the Appellants in the Court below do not seem to have brought before the Court the legal effect of these pleas, and the Court evidently, as it appears from the opinion of the Lord President, took this as conceded; for the Lord President says that

> If they provided a seaworthy ship, tight, staunch, and strong, well-manned, and equipped for the carriage of goods, they say that in consequence of the manner in which the clause of excepted risks is conceived they are free from all other liability.

Having in this way been taken as conceded on the part of the Defenders, it unfortunately was not made a point of contest, and, as sometimes happens in cases where a keen argument is not

submitted to the Court, a point which afterwards turned out to be material was overlooked. That seems to have been what occurred first, in framing the issue, and secondly, in framing the special verdict.

I think, however, my Lords, that the course which your Lordships have indicated with reference to obtaining further investigation into the facts of the case will enable the case to be properly decided, and the case will raise some very important principles in point of law. I do not propose to enter upon these now. I think it is better that they should be reserved for discussion when we have the facts fully before us than that we should state views of the case upon a hypothesis of what may be the result of a future investigation before a jury.

Interlocutor appealed from reversed, and case remitted back to the Court of Session with a declaration that there ought to be a new trial of the issue.

Agents for the Appellants: *Simson, Wakeford, & Simson.*
Agents for the Respondents: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

H. L. (E.) 1877 Nov. 6, 7.

FRANCIS HOLCOMBE READ . . . . . APPELLANT;

AND

ELIJAH CROSIER BAILEY . . . . . RESPONDENT.

Bankruptcy—Fraud—Proof by or against Joint or Separate Estate.

13 Ch D 305

Where there is a bankruptcy of a firm, and there is also a bankruptcy of an individual member of that firm, the joint estate of the firm and the separate estate of the individual member are, as a rule, kept distinct from each other.

But where, under the existing law of bankruptcy, the joint creditors are admitted to prove against the separate estate, it is not material whether the separate estate has or has not been, as a matter of fact, benefited at the cost of the joint estate.

Where an individual partner, fraudulently as to his partners, withdraws funds from the partnership and applies them to his own use, the creditors of the firm are entitled to proof against the separate estate of the individual partner.

Per LORD BLACKBURN:—The length of time during which the fraud was carried on, could not affect the rights of the creditors of the firm, whatever effect it might have if the question arose solely between the separate partner and the members of the firm itself.

THIS was an appeal against a decision of the Court of Appeal, which had affirmed a previous decision of the Master of the Rolls (1).

Suits in the Court of Chancery had been instituted for the administration of the real and personal estate of Sir *Robert Harvey*, Bart., deceased, who had been the acting partner in a bank at *Norwich*, which traded under the style of *Harveys & Hudsons*. The bank was, in the beginning of 1860, carried on by General *Harvey* and his son Sir *Robert Harvey*. *Roger Allday Kerrison*, and (some time afterwards) his son *Roger Kerrison*, agreed to become partners; but before the first articles of partnership were executed General *Harvey* died. Sir *Robert Harvey* then became the head of the firm. The partnership between him and *Kerrison* was to continue for seven years from the 18th of June, 1860. Sir *R. Harvey*

(1) Law Rep. 4 Ch. D. 537, *nom. Lacey* v. *Hill*, and *Leney* v. *Hill*, where the facts are fully detailed.

was to pay all existing debts due by his father and himself, including all that was due to his father's estate, and all losses up to that time were also to be borne by him. The capital was to consist of the property and effects then existing in the business. *Roger Allday Kerrison* was not required to bring in any capital; he was to receive one-fifth of the profits, and the losses were to be paid out of the capital and profits in the same proportions. A reserve fund of £100,000 was to be formed, and *Roger Allday Kerrison* was never to receive less than £1000 a year as his share of the profits; he was not to be obliged to give any portion of his time or attention to the business, but he was to be at liberty, whenever he pleased, to take an active part in it. He did not take any part in the business, except by attending the bank on each Saturday, (which was the market day at *Norwich*,) and looking over the accounts in April and October. Mr. *Hill* (the Defendant in each of the suits in Chancery) was named the manager of the business. A large sum of money had, at the death of General *Harvey*, been credited to his account, and was drawn out of the assets by his executors. The accounts of the bank were kept by Sir *Robert Harvey*, and, on each occasion when Mr. *Kerrison* inspected them, appeared to be of a very favourable character. Sir *Robert Harvey* prepared them in that way, but, in truth, he seems to have drawn out very large sums from the partnership stock, which he had expended and lost on the *Stock Exchange*. On the 15th of July, 1870, Sir *Robert Harvey* shot himself. On the 19th of July a petition in bankruptcy was filed against the banking firm, which was adjudicated bankrupt on the 22nd of July, 1870. The creditors of the firm claimed to prove against the separate estate of Sir *Robert Harvey*, and the question arose whether they could be allowed to do so in competition with his separate creditors. The Master of the Rolls admitted the claim of the joint creditors, and the Court of Appeal affirmed his decision. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Davey*, Q.C. (Mr. *Dundas Gardiner* was with them), for the Appellants:—

The creditors of the firm can have no right to prove, as such, against the separate estate of *Harvey*. The joint creditors trusted

H. L. (E.) 1877 READ v. BAILEY.

the firm, the separate creditors trusted the individual. The origin of the two claims was different, and they cannot now be treated as mutually connected. In no way can it be said that the separate estate has been increased by what has been taken from the joint estate, and unless that is shewn to have been done, and done fraudulently, there can be no claim by the joint as against the separate estate. That is the rule to be deduced from all the authorities. Originally Lord *Talbot* treated the matter as on the footing of contract, and in *Ex parte Blake* (1), decided in 1735, allowed proof by the joint against the separate estate, on the ground that one partner had taken more than he was entitled to under the partnership deed, and the excess formed a debt. There it was considered that the separate estate had been benefited. But in *Ex parte Grill* (2) Lord *Thurlow* restricted such proof to a case where the joint property had been taken with the "fraudulent intent to augment the separate estate." He appears to have ruled the same in *Ex parte Batson* (3). In *Lodge & Fendal* (4), in 1790, Lord *Thurlow* allowed the creditors of a partnership which had existed only two years to prove against the separate estate of one of the partners on the ground of fraud, but he only allowed the proof "*de bene esse*" (5). He thought that case was within *Ex parte Cust*, or *Fordyce's Case* (6), but the case of *Lodge & Fendal* (4) must have again come before him, for it is mentioned in *Cooke's* Bankrupt Law (7) with quite a different result from that stated in *Vesey*, although reference is there made to the report in *Vesey*, Junior. Lord *Thurlow* appears, in the summary given in *Cooke's* Bankrupt Law, to have been speaking of the result of the proof tendered on the inquiry he had directed "*de bene esse*," for he is represented as saying "That if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that *Lodge*, with a view of swindling *Fendal* out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands, with a view to his separate creditors, it might have been diffe-

(1) 1 Cooke, B. L. 8th Ed. 528.
(2) Ibid. 530.
(3) Ibid.
(4) 1 Ves. J. 166.
(5) Ibid. 168.
(6) 1 Cooke, B. L. 531.
(7) Vol. i. p. 530.

rent." And it is then stated that "The petition on the part of the joint creditors to prove against the separate estate was dismissed." It is clear that at that time a fraudulent abstraction of the money, and the purpose, by such fraud, to augment the separate estate, were both required in order to give the joint creditors a title to prove against the separate estate. That rule has not been changed, since *Ex parte Harris* (1) expressly puts the right of proof in such a case on the ground of fraud as distinct from contract or loan, and so do *Ex parte Yonge* (2) and *Ex parte Smith* (3).

The circumstances under which proof by the joint estate against the separate estate may be allowed do not exist here, and such proof cannot be admitted. The long acquiescence of the *Kerrisons* in the dealing with the property by *Harvey* is an answer to this claim. Lord *Thurlow* himself, in the first *Lodge & Fendal's Case* (4), thought even with regard to a partnership of only two years it ought to be shewn that there was an original intention to defraud; and Lord *Eldon*, in *Ex parte Yonge* (5), expressed strongly his own inclination to be that "it is the business of partners to know their transactions, to keep each other right, and perhaps the better rule would have been to impose upon them and hold them to, that strict obligation." So that if Lord *Talbot's* original ruling had been restricted by Lord *Thurlow*, that of Lord *Thurlow* had been questioned and sought to be narrowed by Lord *Eldon*. In *Ex parte Harris* (6) Lord *Eldon* (in 1811) directed an inquiry as to the partnership money applied by the partner *Aldrich* without the knowledge of *Ramsey;* but after that inquiry had been made (7), finding that the money was not taken fraudulently to increase the private estate of the partner taking it, he, in 1813, rejected the proof for the joint against the separate estate. And in the case of *Sillitoe* (8) it was held that no proof could be made on behalf of a firm of two persons against an aggregate firm of which they were members.

Here there is no proof that the separate estate was augmented,

(1) 2 V. & B. 210; 1 Rose, Bank. C. 129, 437.
(2) 3 V. & B. 31; 2 Rose, 40; 1 Cooke, B. L. 8th Ed. 532.
(3) 1 G. & J. 74; 6 Madd. 2.
(4) 1 Ves. J. 166.
(5) 3 V. & B. at p. 38; see 2 Rose, 45.
(6) 1 Rose, 129; 2 V. & B. 210.
(7) 1 Rose, 437; 2 V. & B. 210.
(8) 1 Gl. & J. 374.

H. L. (E.) 1877 READ v. BAILEY.

and there can be no doubt that the *Kerrisons* had ample opportunity to know everything. If they did not use that opportunity that was their own fault. There is, therefore, no ground for favouring this application of the joint creditors.

Mr. *Kay*, Q.C., and Mr. *Cozens-Hardy*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, there are certain authorities in the law of bankruptcy which having been acted upon for nearly a century, and having become interwoven with and actually part of the law of bankruptcy as administered in this country, ought not to be lightly disturbed · and it appears to me that your Lordships cannot arrive at the conclusion at which you are asked to arrive by the Appellant without entirely subverting authorities of that description.

My Lords, the facts of this case are extremely simple. There is a banking firm consisting of Sir *Robert Harvey* and Mr. *Kerrison*. They continue their business for a period of about ten years, at the end of which time Sir *Robert Harvey* dies and dies by his own hand. Sir *Robert Harvey* is the managing partner—Mr. *Kerrison* takes little or no part in the business of the bank. At the end of the partnership, terminating as I have said by the death of Sir *Robert Harvey*, it is discovered that very large sums of money have been drawn out from the partnership and applied by Sir *Robert Harvey* to his own use—sums amounting to £600,000 or thereabouts—and the question is, there being now a bankruptcy of the firm and a bankruptcy of the separate estate of Sir *Robert Harvey*, can the assignees of the firm be admitted to prove as creditors against the separate estate in respect of these sums so drawn out?

Now my Lords, if these sums when drawn out from the firm by Sir *Robert Harvey*, had been entered in the books of the concern as drawn out, however much it might have been against the duty of Sir *Robert Harvey*, as between himself and his partner, to draw out these sums, and however ignorant Mr. *Kerrison* might have been of these drawings, still the drawings would have taken place by the act of one who was the managing partner of the concern,

and who, although in making these drawings he might have exceeded, and abused, his authority, would still have been doing that which by being entered in the partnership books would, in law, have been brought under the notice and within the cognizance of his partner, if that partner had chosen to attend to the details of those books. But if on the other hand those sums were not merely withdrawn by Sir *Robert Harvey* in abuse of his authority, were not merely withdrawn contrary to the terms of the engagement between himself and his partner, but were withdrawn by him fraudulently, by which I mean in a way that was entirely concealed from his partner, and the concealment effected by fraudulent practices of Sir *Robert Harvey*, such as would have made it impossible for the partner by resorting to the books of the concern to know what he was doing, then a very different state of things would arise.

My Lords, I understand the rule in bankruptcy to be well settled on those points, and it is this: In this country, where there is a bankruptcy of a firm, and there is also a bankruptcy of an individual member of the firm, the joint estate of the firm and the separate estate of the partner are kept distinct. On the one hand the joint estate as a general rule cannot prove against the separate estate in competition with the separate creditors, and on the other hand the separate estate cannot prove against the joint estate in competition with the joint creditors.

But, my Lords, that being the general rule, an exception has been engrafted upon it, namely that, to use the expression of Lord *Eldon* in the case just referred to of *Ex parte Sillitoe* (1), where there has been a fraudulent conversion of the property of the one estate to the purposes of the other, there the reason of the rule fails and the rule itself is no longer applicable. I understand the principle of decisions like that of *Ex parte Sillitoe* (1) to be this. So long as you have distinct estates, so long as you keep distinct the joint estate and the separate estate, if you allow the firm, the partnership concern, to make contracts with its separate members and to stand upon those contracts as affording a ground of proof as against the separate creditors, you run a risk, to say the least—perhaps I might say you have the certainty—that contracts

(1) 1 Gl. & J. 374, at p. 382; see *Nanson* v. *Gordon*, 1 App. Cas. 200 (n. 4).

H. L. (E.) 1877 READ v. BAILEY.

will be made between the firm and the individual members which in effect will defeat the rights of the creditors of the individual members. But where you have a conversion of the property of the firm to the purposes of the individual members, not by way of contract or agreement with the firm, not within the knowledge or the cognizance of the firm, but by a fraud of an individual partner, to which the firm is no assenting party, of which its other members are not cognizant and cannot be cognizant, there the reason for the rule ceases, and the firm whose assets have thus been fraudulently abstracted ought not to suffer, and ought not to be deprived of the right to proceed against the separate estate in competition with any other claimants. Whether the separate estate has in the result been increased or not—whether at the time of the proof it is larger than it otherwise would have been or not—is a matter which does not concern the application of the rule, and it is sufficient that at one time the separate estate was increased when the property was thus fraudulently converted and taken for the purpose of one partner.

My Lords, the rule upon the subject was extremely well expressed, and expressed in a way which might almost have been supposed to be addressed to the facts of the present case, by Sir *John Leach* in the case of *Ex parte Smith* (1): "As to the merits of the petition," the Vice-Chancellor "stated that if one partner be entrusted with the entire management of the partnership concern, and he withdraw moneys for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction or wholly omits and conceals it."

My Lords, the only remaining question which I have to ask is this: What was the fact in this particular case, with regard to the mode in which Sir *Robert Harvey* acted as to the books of the concern? I need not go into the details, because there is no dispute with regard to the facts. As to the whole of the sum which could be claimed, or as to so large a part of it as makes any discrimination of the separate items insignificant and unnecessary, the course taken by Sir *Robert Harvey* was the raising of fictitious

(1) 1 Gl. & J. 74; 6 Madd. 2.

accounts, the use of bills which were, as to some of them at all events, fraudulent, and the entering in his own account of fictitious items. The books entirely conceal that which he has drawn out, and on the contrary present a state of things which would shew that none of these fraudulent appropriations of the assets of the partnership had taken place. The case, therefore, is exactly the one contemplated by Sir *John Leach*, where the drawings are not openly confessed in the books, but are concealed in the way in which the books are kept; not only are omitted from the books, but are covered and distorted by entries in the books which are fraudulent entries.

These, my Lords, are the grounds upon which the Master of the Rolls proceeded in the case as it stood before him, and these are the grounds, and the decisions to which I have referred are the decisions, upon which the Court of Appeal acted at the time when the case came before the Court of Appeal. Your Lordships have the unanimous opinion, therefore, of the primary Judge and the Judges before whom the case was heard in the second instance; and I am bound to say that but for the circumstance that a very large sum of money is at stake, I am at a loss to conceive how it could have been supposed that authorities so well settled and rules of law so well established could be called in question or brought for review before your Lordships' House. I submit to your Lordships that the appeal ought to be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am also of opinion that in this case the appeal ought to be dismissed with costs, and that there is no occasion to call upon the Respondent to answer the arguments of the Appellant.

In bankruptcy, where a firm becomes bankrupt, and an individual partner also becomes bankrupt, it seems at one time,—in Lord *Hardwicke's* time—to have been considered that they were to be treated as separate persons altogether—that the firm might prove against the estate of the individual bankrupt, and that the individual, or rather his assignees, might prove against the estate of the firm. But, more than a century since, that was departed from, and a different mode of proceeding adopted—it is not

H. L. (E.) 1877 READ v. BAILEY

necessary, nor would it now be proper, to inquire whether rightly or not—but, since that change, a century has elapsed during which the bankruptcy law has been repeatedly altered and re-enacted, and yet this matter has undergone no alteration. I take it that we must follow the rule, which, at least from 1770, has been established, that a bankrupt firm cannot prove against a separate estate in competition with the creditors of that separate estate, nor can the creditors of a separate partner prove against the joint estate in competition with the creditors of that joint estate. The reason was, I take it, not upon the ground that there was a right in the private creditors to be paid out of the separate estate, or a right in the joint creditors to be paid out of the joint estate, for I do not think that there was any such rule, but it was said the rule was to be adopted, partly, at least, on the ground of convenience in administering the bankruptcy law. It was thought that the administration of the bankrupt law could not be conveniently carried out if the estates were to be mixed. Whether that was a right notion or not I do not know. I believe in *Scotland* the practice has not been the same, the firm has come to prove against the individual, and the individual against the firm, just as if they were separate persons. But the rule I have mentioned has been established here, and we must follow it.

Upon that rule there has been established also an exception The first case which has been distinctly cited in which the exception is referred to is *Fordyce's Case* (1), in 1774, rather more than 100 years ago. In that case the decision was that where the firm was not a creditor of a partner in consequence of a contract made between the firm and the partner, but was so in consequence of a fraudulent conversion by the partner, the firm might prove against the separate estate in competition with the creditors of the individual partner. Now let us see what the reason for thus departing from the rule was. The rule was, I have no doubt, founded partly upon the notion that otherwise there would have been a tendency to fraud, and that pretended contracts would be made with a view to a fraud upon the bankruptcy laws, if a firm were permitted to prove against the separate estate of a partner. That reason of

(1) 1 Cooke, B. L. 562, before Lord *Bathurst*; see *Lodge & Fendal*, 1 Ves. J. 166.

course would not apply where there was no contract at all, and where the right to claim arose not from a contract but from a wrong, from a *tort*, a matter in which one of the parties was no sharer in the transaction at all. The other reason—the reason which seems to have been relied upon by Lord *Thurlow*, namely, that there would be a difficulty in following it out, and that there might be a practical inconvenience in checking the accounts, would probably not apply in a case of that sort, which was a purely exceptional case. However that might be, in 1774 there was this exception brought in, that although the joint estate could not prove against the separate estate in competition with the separate creditors, nor the separate estate prove against the joint estate in competition with the joint creditors in cases where the liability sought to be proved arose from contract, yet where it did not so arise it might.

Now, has that ever been departed from? I cannot find that it has. In the case which Lord *Thurlow* decided of *Lodge & Fendal* (1) this arose. The facts are but obscurely stated, but I collect that in that case the dormant partner had, by deed, given the acting partner who carried on the business the amplest authority to invest the money in any way he pleased, and he pleased to invest it by lending it to himself, to pay his private debts. That was a very wrong thing indeed; it was, as Lord *Eldon* afterwards expressed it, an abuse of his authority—a most improper use of his authority—but he did act upon the authority. I think this is the conclusion to which Lord *Thurlow* came. As soon as it appeared that the partnership had authorized the partner to lend the money of the firm—not merely given him an ostensible authority to deal with the money so that it would be good as to third persons, but had actually given him an authority to lend the money, though he abused that authority, still the debt arose by a contract made with the authority of the firm, and therefore it did not come within this exception, it came within the rule. In *Ex parte Harris* (2) it was exactly the same thing. Lord *Eldon*, in very strong terms indeed, lays down the rule that fraud would be an exception; he then adds that cases of this kind must be decided upon the particular circumstances, and the conclusion of law as to their being fraud must depend upon the nature of those

(1) 1 Ves. J. 166. (2) 2 Ves. & B. 210; 1 Rose, 130–437.

H. L. (E.) 1877 READ v. BAILEY.

circumstances. He then proceeds to state the nature of the circumstances in the case before him, and he states that although the partnership agreement, if it had been followed out, would have made this to be a fraud and a thing without authority altogether, yet, in fact, the way in which the firm had carried on business was such as to make this a really allowed matter, an acting upon the authority—it was exactly similar in this respect, according to the view which I take of it, to the other case which Lord *Thurlow* had previously decided (1). Both of these, I think, are perfectly consistent. In both of these cases the exception did not apply, because it appeared that the debt sought to be proved originated from an authority which was given by the firm, and that there was actually a contract, although those making the contract were abusing their authority, and consequently it was held that the case fell within the general rule, and not within the exception.

Now, my Lords, what is the case here? It certainly seems to me that if ever there was a case in which it was clear that no authority had been given, and in which fraud and deceit did exist, I may say wicked fraud in the conversion of the property, it is the present case. I think Sir *John Leach*, in *Ex parte Smith* (2), stated very clearly one of the grounds on which it would appear that the thing was done by the authority of the firm. He says that where there were no false books and the like, it would appear probably *primâ facie* that it was done by authority, and that where there were false books it would appear *primâ facie* that it was fraudulent. That may be one correct and proper instance, but I think the true way of putting it would be the way in which Lord *Eldon* stated it. The circumstances of each case must be looked at to see whether there was fraud or not. The circumstance mentioned by Sir *John Leach* would be conclusive that there was fraud, but many other circumstances might come out amounting to fraud, although they might fall short of those mentioned by Sir *John Leach*; there might be cases in which there was forgery, and yet it might appear that the debt was contracted by an abuse of authority, and not without authority. I take it that the real principle running through all these cases is,—Was this debt in respect of which the claim is sought to be made upon the separate estate, contracted by the authority, expressed or implied, of the

(1) *Lodge & Fendal*, 1 Ves. J. 166. (2) 1 Gl. & J. 74.

firm, though that authority might have been abused in contracting it, or was it done by fraud without any authority, by an absolute fraudulent conversion of the property of the firm? When once it is brought to that, it seems to me that it would be waste of time to go farther through the facts of the present case. A grosser case of fraud without authority there could not be than the case of Sir *Robert Harvey* in the present instance.

It was attempted to be argued that because he had carried on the fraud for ten years, therefore the matter should not be allowed to be proved, though it might have been proved if the fraud had been carried on only for one year. But whatever might be the case if it were only a question of equity between the separate creditors and the surviving partner, Mr. *Kerrison*, if it be a question whether or no the debt was contracted by the authority of the firm or was a fraudulent debt fraudulently created by a wrongful act, it seems to me that lapse of time only makes a difference in the matter of evidence. That it does make a difference as to the proof is quite plain, it causes a difficulty in getting satisfactory evidence upon the matter, but that difficulty has been overcome in this case, and I cannot conceive that it makes any difference farther than that. It appears to me therefore that the decision of the Court below is perfectly right, and I need hardly say that I express this opinion with the more confidence when I find that it was a decision of the Master of the Rolls unanimously approved of by the Court of Appeal.

LORD GORDON:—

My Lords, I entirely concur in the views expressed by your Lordships with regard to the decision in this case. In *Scotland* the difficulty would not arise, as was explained by my noble and learned friend, Lord *Blackburn*, with reference to the right to claim by company creditors upon the private estate of a partner of the firm.

Judgment of the Court below affirmed, and appeal dismissed with costs.

Lords' Journals, 7th November, 1877.

Solicitors for Appellant: *Travers Smith & Co.*
Solicitors for Respondent: *Sole, Turners, & Knight.*

[PRIVY COUNCIL.]

J. C.* 1877 Nov. 23.

JOHN SAMUEL SWIRE AND OTHERS . . PLAINTIFFS;

AND

ROBERT FRANCIS . . . . . DEFENDANT.

[ON APPEAL FROM THE SUPREME COURT AT SHANGHAI.]

Principal and Agent—Fraudulent Misrepresentation by an Agent—Liability of Principal for Moneys wrongfully received by his Agent.

5 App Cas 319
326, 339
6 QBD 764
22 CLD 168

S., being employed by the Respondent to carry on his business, credited the Respondent in account with the Appellants with the sum of 5800 taels, which he falsely represented to have been advanced in the ordinary course of business on certain goods intended for shipment. He then drew a bill in the name of the Respondent's firm on the Appellants for the balance of account, and having received the proceeds of such bill, including the said 5800 taels, appropriated them to his own use.

On a special case submitting whether the Respondent was liable to the Appellants in the said sum with interest from date of receipt by *S.*, *held*, that the proceeds of the bill having been received as aforesaid by *S.* acting throughout within the scope of his authority, belonged to the Respondent; and that he having thus been paid 5800 taels without consideration the Appellants were entitled to recover back the same.

Barwick v. *The English Joint Stock Bank* (1), and *Mackay* v. *The Commercial Bank of New Brunswick* (2) approved.

SPECIAL case stated as follows, February 7, 1877, in the Supreme Court at *Shanghai*:—

"1. The *China Navigation Company, Limited* (hereinafter referred to as "the company"), is an English joint stock company, having its head office in *London*, and is the owner of a line of steamers running between *Shanghai* and *Hankow* on the River *Yangtsze*. The general agents of the company in *China* are the firm of *Butterfield & Swire*, of *Shanghai*, and the agents of the company at the various ports on the river work under their direction and account to them.

"2. The company's agent at *Kiukiang* (one of the ports on the River *Yangtsze*, below *Hankow*) from the month of April, 1873,

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 5 P. C. 412.

to the 31st of March, 1876, was the above-named *Robert Francis*, who was carrying on business there as a general merchant, under the style or firm of *R. Francis & Co.* The said *Robert Francis* also carried on business at *Shanghai*, and resided there. He only occasionally visited *Kiukiang*, and his business, including the business of the company, was practically carried on by one *W. H. Shaw*, who signed the name of Mr. *Francis's* firm per procuration. The said *W. H. Shaw* was engaged by the said *Robert Francis*, and was paid by him. The said *Robert Francis* was remunerated for his services as agent for the company by a commission on the net freights and passage moneys earned through the agency.

"3. The company, for the purpose of its business at *Kiukiang*, had a hulk or receiving ship moored off the shore there, through which goods, carried by its steamers, were landed or shipped, as the case might be, and goods intended for shipment were frequently stored therein. The hulk, and the business carried on therein, was under the immediate control of the said firm of *R. Francis & Co.*

"4. It was part of the business of the general agents (on their own account as a firm, and not as agents for the company) to make advances through the company's local agents to Chinese merchants upon goods intended for shipment or in course of shipment by the company's steamers. Such advances were, from time to time, made through Messrs. *R. Francis & Co.*, to merchants and others shipping or intending to ship from the port of *Kiukiang*. They were made either with sycee, remitted for the purpose by the general agents, or with the proceeds of drafts drawn in respect of them by Messrs. *Francis & Co.* upon the general agents.

"5. The instructions given by the general agents to Messrs. *R. Francis & Co.* (as well as to the other local agents of the company) were to make such advances only upon goods in their custody or under their control, or in the custody or otherwise under the control of the company, and the general agents had no reason to suppose that the instructions were not being followed. Each agency rendered accounts to the general agents monthly, or, if required, oftener.

"6. Messrs. *R. Francis & Co.* received no specific remuneration for conducting or superintending the business of these advances,

J. C. 1877 SWIRE v. FRANCIS.

and the interest upon them was accounted for to Messrs. *Butterfield & Swire* clear of any deduction. They (Messrs. *R. Francis & Co.*) did, however, derive benefit from the advances, inasmuch as unless they had had facilities for making advances to native shippers the latter would, in many cases, have gone to one or other of the rival companies plying on the river at the time, and Messrs. *R. Francis & Co.* would thereby have lost commission. During the period of three years during which Messrs. *Francis & Co.* were the company's agents, advances of this kind were made through them to the amount of 400,000 taels and upwards.

"7. On and from the 1st of April, 1876, the agency of the company at *Kiukiang* was transferred from Messrs. *R. Francis & Co.* to Messrs. *R. Anderson & Co.*, also of *Kiukiang*, and Mr. *Shaw* at the same time entered the service of the latter firm, but he still continued to represent the former firm, which from that date went into liquidation.

"8. At the time of the transfer of the agency Mr. *Francis* himself was in *Kiukiang*, having arrived there on the 27th day of March, 1876.

"9. Early in April, 1876, and while Mr. *Francis* was still in *Kiukiang*, the general agents received from *Kiukiang* a final cash account from Messrs. *R. Francis & Co.*, under date of the 31st March, and signed "pr. pro *R. Francis & Co.*, *W. Hy. Shaw*, agents, *C. N. Co.*"

"In this account Messrs. *Francis & Co.* credited themselves with the following items:

	K. Tls.
"'1876, March 26. By advances *Yocksing* on paper	2600
"' „ „ *Loong-Kee* „ .	3200
"'*Kiukiang* Taels	5800'

"This in effect was a representation that they had in the ordinary course of business advanced the sums named upon two parcels of paper which were awaiting shipment by one of the company's steamers, and the general agents were entitled to assume that the goods were in the company's hulk or godown, or were otherwise under the control of the company. For the purposes of this case it is to be assumed that no such goods were ever received or stored

in the aforesaid hulk, nor were the goods ever under the control of the said company, or the said Messrs. *Francis & Co.*

"10. At the same time that the account mentioned in the last paragraph was rendered, Mr. *W. H. Shaw*, in the name of Messrs. *R. Francis & Co.*, drew upon Messrs. *Butterfield & Swire* for the balance shewn by it, and the draft was duly honoured.

"11. On or about the 31st March, Messrs. *R. Francis & Co.* wrote to Messrs. *R. Anderson & Co.* as follows:

"'We hand you for your guidance the following statement of account owing to the *China Navigation Co.*, by the tea hongs here, viz., Tls.1221$\frac{35}{\cdot}$."

[Then follow particulars.]

"'We also hand you a list of advances upon cargo to go forward.

"'*Yock-Sing* . . . Tls.2600

"'*Longkee* . . . „ 3200 Tls.5800

"'These bear interest at 12% pr. an. from March 26, 1876.

"'Pr. pro. *R. Francis & Co.*

"' *W. Hy. Shaw.*

"' Agents *C. N. Co.*'

"12. In the month of June, 1876, Messrs. *R. Anderson & Co.* rendered to Messrs. *Butterfield & Swire* a statement of their account with the company, dated 31st May, 1876, and signed "p. *Robt. Anderson & Co., W. H. Shaw*, agents, *C. N. Co.*," in which they gave credit, under date of 10th May, for *K.* Tls.5800 as loans repaid, and for Tls.87 as interest thereon, from the 26th March to the 10th May.

"13. On the 25th November, 1876, Messrs. *R. Anderson & Co.* informed Messrs. *Butterfield & Swire* that, on going over their accounts, they had found that the *K.* Tls.5800 and the *K.* Tls.87, with which they (Messrs. *Butterfield & Swire*) had been credited in May, had never been received by them (Messrs. *Robt. Anderson & Co.*), and that they had accordingly written back the amounts in an account which they were then forwarding. Practically, in consequence of this step, Messrs. *Butterfield & Swire* have had to pay the said sum of *K.* Tls. 5800, or its equivalent, *Shanghai* Tls.6073$\frac{30}{\cdot}$, and the date on which the payment may be taken to have been made was the 2nd of April, 1876.

J. C. 1877 SWIRE v. FRANCIS.

"14. Upon investigation it appears that the sums said to have been advanced never were advanced, and the only inference is that Mr. *Shaw* appropriated them to his own use.

"15. Mr. *Shaw* left *China* in November last and has not yet returned.

"16. Neither the said *Robert Francis* nor Messrs. *Anderson & Co.*, the present agents of the company, ever had any reason to believe that the said *William Henry Shaw* was other than a fit and proper person to be engaged and employed in the management of the said business, and no suspicion of his untrustworthiness was entertained up to the time of the discovery of the irregularities now alleged against him.

"17. In the course of their business as agents for the company Messrs. *R. Francis & Co.* had to make certain payments on account of brokerages to shippers, and they from time to time rendered accounts of these payments to the general agents, and debited the company with them.

"18. Messrs. *Anderson & Co.* have paid certain shippers at *Kiukiang* the sum of *K.* Tls.$54\frac{61}{\cdot}$ (equal to *Shanghai* Tls.$57\frac{18}{\cdot}$), being the amount of certain brokerages which, for the purposes of this case, are to be assumed to have been still due to them in respect of shipments made in the year 1875, with which amounts *R. Francis & Co.* had already debited the company; the accounts in this case also being signed by Mr. *Shaw;* and Messrs. *Anderson & Co.* have also debited the company with these payments.

"The Court is to be at liberty to draw such inferences of fact as a jury might draw.

"The question for the Court is, whether the Defendant is liable to the Plaintiffs in the said sums of Tls.$6073\frac{30}{\cdot}$ and Tls.$57\frac{18}{\cdot}$ respectively.

"If the Court shall be of opinion in the affirmative, then judgment shall be entered up for the Plaintiffs for such amount as the Court determines to be due, and as regards the said sum of Tls.$6073\frac{30}{\cdot}$ or such part thereof as the Court may determine to be due, with interest calculated from the 2nd of April, 1876, at a rate to be fixed by the Court.

"If the Court shall be of opinion in the negative, then judgment shall be entered up for the Defendant.

"The costs to abide the event."

On the 15th of February, 1877, the Supreme Court dismissed the Appellants' claim with costs.

Mr. *Gainsford Bruce* (Mr. *Benjamin*, Q.C., with him) for the Appellants, contended that the judgment of the Court below was wrong both in fact and in law. It was founded on a mistaken view of the facts, because it assumed that *W. H. Shaw* misappropriated the money of the Appellants, whereas in truth he misappropriated the money of the Respondent, as was shewn by the fact that a bill was drawn on the Appellants for the pretended advance, and by the Appellants paid to the Respondent, to whom the same thereupon belonged. The fraud consisted in charging the Appellants in account with advances not made, and then drawing for the amount of the fictitious advance. It was the device of *Shaw* to conceal his own embezzlement of the Respondent's money by replacing it with the Appellants' money. The money was allowed in account by the Appellants on the fraudulent misrepresentations made by the Respondent through his agent *Shaw*. He contended that the credit so allowed in account for fictitious advances could not avail the Respondent, who could not be permitted, notwithstanding his own innocence, to hold the Appellants responsible for the fraud of his own manager and agent. He referred to *Mackay* v. *The Commercial Bank of New Brunswick* (1); *Swift* v. *Winterbotham* (2); *Barwick* v. *The English Joint Stock Bank* (3).

The judgment of their Lordships was delivered by

SIR R. P. COLLIER:—

The facts material to the decision of this case may be shortly stated. The Plaintiffs were general agents at *Shanghai* of the *China Navigation Company*, and employed local agents at various places in *China*, their local agent at *Kiukiang* being Mr. *Robert Francis*, the Defendant. In paragraph 4 of the case it is stated:—"It was part of the business of the general agents," that is, the Plaintiffs "(on their own account as a firm, and not as agents for the company), to make advances through the company's local agents to Chinese merchants upon goods intended for shipment, or

(1) Law Rep. 5 P. C. 412. (2) Law Rep. 8 Q. B. 244.
(3) Law Rep. 2 Ex. 259.

J. C. 1877 SWIRE v. FRANCIS.

in course of shipment, by the company's steamers. Such advances were from time to time made through Messrs. *R. Francis & Co.* to merchants and others shipping, or intending to ship, from the port of *Kiukiang*. They were made either with sycee remitted for the purpose by the general agents, or with the proceeds of drafts drawn in respect of them by Messrs. *Francis & Co.* upon the general agents."

It may be here observed that no question arises founded upon the actual remittance of sycee. The case goes on to state, in paragraph 9, "Early in April, 1876, and while Mr. *Francis* was still in *Kiukiang*, the general agents received from *Kiukiang* a final cash account from Messrs. *R. Francis & Co.*, under date of 31st March, and signed 'pr. pro. *R. Francis & Co., W. Hy. Shaw*, agents, *C. N. Co.*' In this account Messrs. *R. Francis & Co.* credited themselves with the following items:—

	K. Tls.
"'1876, March 26:	
"'By advances, *Yocksing*, on paper . .	2600
"' „ *Loong-kee* „ . .	3200
"'*Kiukiang* taels	5800'

"This in effect was a representation that they had in the ordinary course of business advanced the sums named upon two parcels of paper which were awaiting shipment by one of the company's steamers, and the general agents were entitled to assume that the goods were in the company's hulk or godown, or were otherwise under the control of the company. For the purposes of this case it is to be assumed that no such goods were ever received or stored in the aforesaid hulk, nor were the goods ever under the control of the said company, or the said Messrs. *Francis & Co.* At the same time that the account mentioned in the last paragraph was rendered, Mr. *W. H. Shaw*, in the name of Messrs. *R. Francis & Co.*, draw upon Messrs. *Butterfield & Swire* for the balance shewn by it, and the draft was duly honoured."

Their Lordships have to observe that the draft is not set out in the case. It does not appear distinctly upon what day it was drawn, or when it became due, and was actually paid, or what was the amount of it. Only this appears, that it was drawn for the

balance of the account, and that balance was improperly increased as against the Plaintiffs by the sum of 5800 taels.

The case goes on to say that the date of the payment must be taken to have been made on the 2nd of April, 1876, probably the date on which the bill was drawn. There follows this further statement:—"Upon investigation it appears that the sums said to have been advanced never were advanced, and the only inference is that Mr. *Shaw* appropriated them to his own use. Mr. *Shaw* left *China* in November last and has not yet returned."

Their Lordships are of opinion that it was within the scope of the authority of Mr. *Shaw*, as that expression has been defined in many cases, to make out the account which is spoken of in paragraph 9; to insert in it the advances made on goods on account of the Plaintiffs; and to draw the bill for the purpose of covering the balance of the account. All this was in the ordinary course of business. It is of course not to be assumed that he was authorized to commit a fraud by making the false entry of the advance of 5800 taels; but it would have been within the scope of his authority to make an advance of that kind, and to enter it in the account when made, and the case, therefore, in their Lordships' opinion, falls within the principle which is well stated by Mr. Justice *Willes* in the case of *Barwick* v. *The English Joint Stock Bank* (1), where he observes:—"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." This doctrine has been also laid down by this Board in the case of *Mackay* v. *The Commercial Bank of New Brunswick* (2).

Their Lordships are disposed to infer from paragraph 14 that *Shaw*, instead of advancing the 5800 taels, which he pretended had been advanced to merchants upon cargoes to be shipped, in reality appropriated so much of his master's money to his own use, and having so misappropriated it, drew a bill in the name of his master and in the course of business upon the Plaintiffs for

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 5 P. C. 412.

J. C. 1877 SWIRE v. FRANCIS.

replacing that money, and that the Plaintiffs have repaid to Mr. *Francis* the money of his own, which had been misappropriated by his agent. But even if it be assumed, as perhaps it was in the Court below, that *Shaw* appropriated only the proceeds of the bill which had been drawn for the increased balance to the extent of 5800 taels, still it appears to their Lordships that no substantial difference would arise in the legal bearings of the case. The bill was drawn by him in pursuance of a general authority which he had to draw on behalf of *Francis & Co.*, whose sole representative he was in the business which *Francis* carried on at *Kiukiang;* it was paid by the Defendant to the account of *Francis & Co.*; for a general balance, which was improperly increased by the amount of 5800 taels. The proceeds of this bill belonged to *Francis & Co.*, and the case comes to this, that 5800 taels were paid to *Francis & Co.* by the Plaintiffs without any consideration whatever, and that *Shaw* fraudulently misappropriated that money. In either aspect of the case it appears to their Lordships to fall within the authority of the case which has been referred to of *Barwick* v. *The English Joint Stock Bank* (1), as well as within the authority of *Mackay* v. *The Commercial Bank of New Brunswick* (2).

Their Lordships have only further to observe that it would appear to them that the Court below was somewhat misled by the assumption that the law concerning the relations of bailor and bailee applies to this case. If the question had arisen with respect to an actual transmission of bullion or coin which had been stolen by *Shaw*, the observations of the Court would have been applicable, but it appears to their Lordships that this case is governed by other considerations, to which they have referred.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the Court below be reversed, and that judgment be entered for the Plaintiffs for 6073½ taels (*Shanghai* currency) in addition to the sum for which it is at present entered, together with interest to be fixed and calculated, in the manner provided by the special case, and that the record be remanded to the Supreme Court at *Shanghai* for this purpose. The Appellants will have the costs of the appeal.

Solicitors for Appellants: *Flux & Co.*

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 5 P. C. 412.

[PRIVY COUNCIL.]

GEORGE HENRY DAVENPORT . . . . DEFENDANT;

AND

HER MAJESTY THE QUEEN . . . . . PLAINTIFF.

J. C.*
1877
Nov. 7, 8, 9;
Dec. 10.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland Agricultural Reserves Act of 1863, *s.* 8—*Leasing Act of* 1866—*Lease—Forfeiture—Waiver—Rent received under Protest.*

A lease of Crown lands for eight years having been granted by the Respondent under 31 Vict. No. 46, subject to the terms and conditions contained in the *Agricultural Reserves Act* of 1863 and the *Leasing Act* of 1866, the lessee failed to perform his covenant to cultivate one-sixth of the said lands within a year from the allotment thereof. Rent, however, for the whole term of years was subsequently received by the Government, the latest being in 1873, with full knowledge of the above breach of covenant, but after notification in the *Gazettes* of 1869, 1870, and 1871, that the same would be received conditionally and without prejudice to the rights of the Government:—

Held, in ejectment brought by the Respondent, that whether or not a valid grant could be made to a selector failing to perform the condition under sect. 8 of the *Agricultural Reserves Act*, the same section read into the above lease does not render it void, but voidable at the option of the lessor, on breach of condition by the lessee.

Held, further, that assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the notifications.

Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt.

APPEAL from an order of the Supreme Court of *Queensland* (March 9, 1875), discharging a rule to set aside a verdict found for the Respondent and to enter a nonsuit or a verdict for the Appellant, or for a new trial in an action of ejectment brought in the name of Her Majesty, on the fiat of her Attorney-General for *Queensland*, to recover 320 acres of land in the county of *Aubigny* in that colony. The action was brought under the *Audit Act* (*Queensland*), 25 Vict. No. 15, sect. 57. The writ of ejectment

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1877 DAVENPORT v. THE QUEEN.

(Sept. 16, 1874) was directed to the Appellant as tenant in possession, and laid the title of Her Majesty as having accrued on and since the 3rd of May, 1869. Afterwards, on the 11th of November, 1874, one *C. G. D'Abedyll* appeared by leave of a Judge and defended as landlord of the Appellant for the whole of the land mentioned in the writ. On the 1st of December, 1874, a suggestion of the death of *Abedyll* was entered on the record, and the proceedings were, by order of the Court, continued against the Appellant.

The main questions involved in the appeal were, first, whether a lease granted by the Crown under and in pursuance of the *Agricultural Reserves Act* of 1863 and the *Leasing Act* of 1866, to the person under whom the Appellant claimed, ever became liable to be forfeited; and next whether, assuming that it had become so liable, the right of forfeiture had not been waived.

The terms of the lease and the sections of the various Acts, so far as they are material, together with the facts of the case, are sufficiently set forth in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *J. D. Wood* (Mr. *Davenport* with them) for the Appellant:—

First, this action is premature. The meaning of the proviso in sect. 12 of the *Leasing Act* of 1866 (30 Vict. No. 12) is that if land in an agricultural reserve is taken up on lease, the lessee shall be bound to cultivate not less than one-sixth of it within the term granted by the lease, and not that he shall be bound to cultivate the same within twelve months from the commencement of the term. Such term had not expired at the date of action brought. Further, the *Crown Lands Alienation Act* of 1868 (31 Vict. No. 46) became law before the lease in question was executed, though after the payment of the first year's rent by the intended lessee. The effect of that was that if, according to the true interpretation of the above proviso, the lessee was bound to fulfil the condition as to cultivation within twelve months from the commencement of the term instead of at any time within the term, then, under sect. 68 of the new Act the improvements substituted thereby in lieu of cultivation might be effected at any time within the term, which had

not expired when the action was brought. No breach of covenant had occurred which would entitle the Crown to declare a forfeiture, *cf.* sects. 7 and 8 of the Act of 1863, in connection with sect. 12 of the Act of 1866; and under the circumstances the lease could not have been determined except for non-payment of rent. The Appellant had the whole eight years to make improvements in; if he failed to effect them he might be disentitled to a grant in fee at the end of the term, but while the term subsisted he could not be ejected. Reference was made to sect. 51, sub-s. 9 of the Act of 1868. Moreover, the Crown has not refunded to the Appellant the rent or purchase-money paid by him, less one-fourth, as by sect. 8 of the *Agricultural Reserves Act* of 1863 is provided to be done whenever the Crown insists on its right of forfeiture.

It appears from the evidence that after payment of the rent for the fourth year the Commissioner of Crown Lands granted to the Appellant a certificate relating to the lands in question in this appeal, and other lands, to the effect that the conditions therein specified had been fulfilled by the lessee, as required by the Act, to entitle him to a deed of grant in fee simple, on payment of the balance of rent due. The Court below, no doubt, had held that the certificate was insufficient, since it failed to shew that improvements of the value of 5 shillings per acre had been effected in the particular parcel of land in question, as it merely stated that improvements of the value of 5 shillings per acre on the total number of acres to which the certificate related had been effected. Such certificate, it was contended, was conclusive. They referred to *Stallhard* v. *Lee* (1); *Milner* v. *Field* (2); *Colonial Bank of Australia* v. *Willan* (3), in which *Reg.* v. *Bolton* (4) was cited. Reference was also made to *Godard* v. *Gray* (5). Next, assuming that there had been a forfeiture, it was waived. The Crown, with full knowledge through its agent, the Minister for Lands, that the lease was liable to be forfeited, received rent from the lessee; permitted its Surveyor-General to register a transfer from

(1) 3 B. & S. 364.
(2) 5 Ex. 829.
(3) Law Rep. 5 P. C. 417, 443.
(4) 1 Q. B. 66.
(5) Law Rep. 6 Q. B. 139.

J. C. 1877 DAVENPORT v. THE QUEEN.

the lessee to the Appellant; and also received rent from the Appellant. With regard to the notices in the *Gazettes* of 1869, 1870, and 1871, relating to payment of rents, no evidence was offered that they ever came to the knowledge of the Appellant. Even if they had, they would not have rendered the receipt of rent any the less a waiver of any prior forfeiture. See *Croft* v. *Lumley* (1). This case is stronger since the Government received the money *eo nomine* as rent: *Goodwin* v. *Robarts* (2). See notes to *Dumpor's Case* (3).

The option was with the Government, and it preferred to waive the forfeiture, receive the rent, and revive the lease. There is no such thing as an absolute forfeiture which cannot be waived. That might have been so formerly, and Lord *Coke* distinguished between void and voidable; but that distinction has vanished. [SIR MONTAGUE E. SMITH:—Probably the other side say that the Crown is so fettered by Acts of Parliament that it cannot exercise its discretion.] That would not be giving the Crown the same rights as individuals: *Bridges* v. *Longman* (4). Sect. 8 of the Act of 1863 renders this lease voidable at the option of the Crown. [SIR BARNES PEACOCK referred to *Maxwell* on Interpretation of Statutes, p. 185.] See *Attorney-General* v. *Ettershank* (5) and *Malins* v. *Freeman* (6).

Sir *Hardinge Giffard*, S.G., and Mr. *Kekewich*, Q.C. (Mr. *C. Bowen* with them), for the Respondent:—

First, with regard to the question of forfeiture of the lease. The lessee did not within 12 months from the date of selection or from the date of the lease make a declaration in the form contained in the schedule to the *Agricultural Reserves Act* of 1863, that he had cultivated not less than one-sixth of the said land, nor in fact was not less than one-sixth, or any of the said land cultivated within either of those periods. The lessee did not at any time within either of those periods prove by two credible

(1) 6 H. L. C. 672; 5 E. & B. 648, 663.
(2) Law Rep. 1 App. Ca. 476.
(3) 1 Sm. L. C. 41.
(4) 24 Beav. 27.
(5) Law Rep. 6 P. C. 354.
(6) 4 Bing. N. C. 395.

witnesses to the satisfaction of the Commissioner for the district in which the land is situate that he was then or at the time of selection a resident within the district, nor did the lessee perform on the land improvements in lieu of cultivation, either by fencing or otherwise, in the aggregate equal to the sum of 5 shillings per acre on the total number of acres in the selection. And in consequence, according to the right construction of the sections referred to in this case, the lessee having failed to fulfil the statutory conditions of the lease, his right and interest to the land absolutely ceased and determined. If, therefore, the Appellant is to succeed the term must be revived. The reason and policy of the Land Acts were that the land should be settled on and improved, or else that the selector should not have the land. That was why each selector was only to have a limited quantity of 320 acres of land; and also why the Acts distinguished between pastoral and agricultural holdings. And the lease is not a lease in the sense in which that word is used in *England*, but an arrangement giving the option of purchase by performing certain conditions. The Act of 1866 merely provides a system of deferred purchase. That which gives the lessee his title or interest is the fulfilment of the conditions. The lease is merely a convenient form of recording the transaction. With regard to the effect of sect. 8 of the Act of 1863, there is no difference as to rules of construction between Acts of Parliament and private deeds. The intention of the parties or of the Legislature must be looked to, and the construction arrived at in the ordinary way; see preamble of Act of 1863, and sects. 2 and 13.

With regard to the certificate of fulfilment of conditions relied on by the other side, it was only a certificate under the *Crown Lands Alienation Act*, 1868, s. 51, sub-s. 6, and had no application to land of the class to which the *locus in quo* belonged, and was inoperative. Neither the Appellant, nor any person claiming under the lease, has obtained a certificate under sect. 68 of the *Crown Lands Alienation Act*, 1868.

It was also contended that there had been no waiver in fact of any forfeiture, assuming one to have occurred; and no power in the Crown, having regard to the true construction and policy of the Acts, to remit or waive the same, except in respect of

J. C. 1877 DAVENPORT v. THE QUEEN.

residence. Such power resided exclusively in the Legislature, and there had been no waiver or remission by the Legislature or under its authority.

Mr. *J. D. Wood* replied.

1877 *Dec.* 10.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This was an action of ejectment in the Supreme Court of *Queensland*, brought by Her Majesty to recover an allotment, part of the Crown lands of the colony, which had been leased for eight years to one *Meyer*, on the ground that the lease was forfeited. The allotment consisted of 320 acres, numbered 196 in the *Darling Downs* district, and formed part of what is called "agricultural reserves."

The principal questions for consideration are, first, whether the lease was forfeited, and, secondly, if so, whether the forfeiture could be, and was, waived by the Crown.

Several statutes have been passed by the Colonial Legislature regulating the sale and letting of the waste lands of the Crown. The principal enactments relating to the questions raised in this appeal are the following:—

The *Agricultural Reserves Act* of 1863 (27 Vict. No. 23), after empowering the Governor in Council to set apart lands for agricultural purposes, to be denominated agricultural reserves, and to offer them for sale in portions of not more than 320 acres, at a fixed price of 20*s.* an acre, enacts as follows:

Sect. 4. "Any person desiring to purchase land in an agricultural reserve, after the same has been proclaimed open for sale, may apply to the land agent for the district in which the reserve is situated, and shall point out the particular portion of land, and shall at the same time pay to the land agent the sum of 20 shillings for every acre, together with the amount of deed fee, and he shall, subject to the provisions hereinafter contained, be deemed to be the purchaser of said land, and entitled to a grant in fee simple."

Sect. 7. "If within twelve months from the date of selection,

the selector of land in an agricultural reserve shall make a declaration in the form contained in the schedule to this Act, that he has actually resided on the lands held by him in the said reserve for a period of not less than six months, and that he has cultivated not less than one-sixth of the land so selected, and shall have fenced in the said selection with a substantial fence of not less than two rails, then a deed of grant shall be issued to such selector: Provided that the Governor or other officer appointed in that behalf may require any reasonable evidence in support of the truth of such declaration."

Sect. 8. "If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required by sect. 7 of this Act, then the right and interest of such selector to the land selected shall cease and determine, and the amount of the purchase-money, less by one-fourth part, shall be refunded to him by the issue of a land order, entitling the holder to the remission of such three-fourths of the same in the purchase of other Crown lands."

The scheme of this Act, which provided only for the sale of agricultural reserves, was that the selector should pay at the time of selection the full purchase-money of 20 shillings per acre, and should then, subject to the performance of certain conditions, be deemed to be the purchaser, and entitled to a grant in fee. No present term or estate was conferred upon the selector, but only an inchoate right to a grant, liable to be defeated on failure to perform the conditions, the selector in that case being entitled to have "the amount of his purchase-money, less by one-fourth," refunded to him in the manner described.

Three years later the *Leasing Act* of 1866 (30 Vict. No. 12) was passed, under which the lease in question was granted. This Act made provision for leasing lands which had been put up for sale by auction and not sold. One year's rent was to be paid in advance by applicants for leases.

It contained the following further enactments:—

Sect 5. "The person declared lessee shall receive from the land agent a lease in such form as the Governor in Council shall appoint, and shall sign a duplicate lease, which shall be forwarded by the land agent to the office of the Surveyor-General."

J. C.
1877
DAVENPORT
v.
THE QUEEN.

Sect. 6. "Every such lease shall be made subject to the following conditions:—

"(1.) The term thereof shall be for eight years inclusive, commencing from the first payment of rent.

"(2.) The yearly rent shall be at the rate of two shillings and sixpence per acre when the upset price of the land or the sum for which it is open to purchase by selection is 20 shillings per acre; but if the upset price of such land or the price at which such land is open to purchase by selection be higher than 20 shillings per acre, then the rent shall be increased in proportion.

"(3.) The rent for the second and each succeeding year shall be paid in cash in advance to the Treasury at *Brisbane* on or before the 1st day of January, and in default of such payment in advance the lease shall be forfeited, and the land and all the improvements thereon shall revert to the Crown."

This sub-section then provides that the lessee may defeat the forfeiture by paying the rent and a certain amount by way of penalty within ninety days.

"(4.) So soon as the lessee shall have made the eighth payment of rent as aforesaid, he shall be entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable on the issue of deeds of grant.

"(5.) If at any time during the term of such lease the lessee shall pay in cash or land orders into the Treasury at *Brisbane* the rent for the unexpired portion of such term, he shall be forthwith entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable on the issue of deeds of grant."

The following section brought unselected allotments of the agricultural reserves within the operation of this Act:

Sect. 12. "All lands in agricultural reserves which shall have been or may hereafter be proclaimed as open for selection, and have remained so open and unselected for one calendar month, shall be open to lease by the first applicant under the terms and conditions specified in the sixth clause of this Act: Provided only, that if taken up on lease they shall be subject to the same condition and restriction as to cultivation and quantity as if they were selected by purchase."

By sect. 17 so much of the 7th clause of the *Agricultural*

Reserves Act of 1863 as required residence on and fencing of selections was repealed.

This was the state of legislation when *Meyer* became the applicant for a lease of the allotment in question; but before his lease was granted, an Act to consolidate and amend the laws relating to the alienation of Crown lands was passed, viz., *The Crown Lands Alienation Act* of 1868 (31 Vict. No. 46). It contains the following enactment:—

"Any selector who before the passing of this Act shall have selected land in any agricultural reserve under the 4th and 5th sections of the *Agricultural Reserves Act* of 1863, or *Leasing Act* of 1866, and who shall have proved by two credible witnesses to the satisfaction of the Commissioner that he, his heirs, assigns, or lessees is, or at the time of selection was, a resident within the district over which such Commissioner may have jurisdiction, is hereby empowered at his option to substitute improvements in lieu of cultivation, the fencing of the said land to be deemed and taken to be part of the said improvements, provided that such improvements shall in the aggregate be equal to the sum of 5 shillings per acre, on the total number of acres so selected by him as aforesaid. And upon the said selector proving by two credible witnesses to the satisfaction of the Commissioner of the district that he has performed the conditions aforesaid, then the said Commissioner shall issue a certificate accordingly, and the said selector shall thereupon be entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable in the issue of the said deed of grant and balance of rent due."

The terms and conditions of the leases to be issued under this Act are prescribed by sect. 51.

The lease is from Her Majesty, and is dated on the 1st of May, 1868. After reciting that *Meyer*, in pursuance of the *Agricultural Reserves Act* of 1863, and *Leasing Act* of 1866, had applied to be declared lessee of the allotment, and paid £40 as the first year's rent in advance, Her Majesty, in consideration of the rent so paid in advance, and of the covenants by the lessee, demised the land to *Meyer* for the term of eight years, from the 23rd of September, 1867, "being the day upon which the first payment of rent was made, and thenceforth fully to be complete and ended, with all

J. C. 1877 DAVENPORT v. THE QUEEN.

the rights of purchase and other rights, powers, and privileges, and subject to the terms, conditions, exceptions, reservations, provisoes, penalties, and forfeitures in the said Acts contained."

The reddendum is: "Yielding and paying to us, our heirs and successors, yearly, and every year in advance during the continuance of the said lease, the rent or sum named in the second schedule." (This schedule provides for the first payment on the 23rd of September, 1867, and for subsequent payments on the 1st of January in the years from 1869 to 1875 inclusive.) The lease contains covenants by the lessee for payment of the rent, and also to cultivate at least one-sixth part of the land within one year from the commencement of the term of the lease, and to observe, perform, and keep the clauses, conditions, and provisoes applicable to the lands demised in the Acts contained.

It appears that two transfers of the lease have been made, viz., one from *Meyer* to Mr. *Davenport* (the Appellant), and the other from him to Mr. *D'Abedyll*, and that both were registered by the Surveyor-General, the first on the 14th of June, 1869, and the last on the 28th of June, 1870. The Appellant was in possession as tenant to Mr. *D'Abedyll*, when the ejectment was brought.

The forfeiture insisted upon by the Crown is the failure of *Meyer* to cultivate or improve the allotment within a year from the 23rd of September, 1867, the date of his application to be declared lessee. In point of fact this failure happened, but the Appellant contends, on grounds to be presently adverted to, that a forfeiture was not thereby incurred, or if it was, that it has been waived. He relies moreover on a certificate granted by the Commissioner of Crown Lands.

The principal facts are undisputed. The rent payable on the 1st of January, 1869, was duly paid into the colonial treasury, but there being no evidence that the Crown was then made aware of the non-improvement, nothing turns upon this payment. However, on the 1st of February in that year the surveyor of the *Darling Down* district, who had been directed by the Surveyor-General to examine the allotments which had been leased, made a report in which he stated that no cultivation or improvement had been made, among others, in the allotment in question. A copy of this report was sent in the month of June following by

the Surveyor-General to Mr. *Taylor*, the Minister for Lands of the colony. Mr. *Taylor*, who was examined at the trial, deposed that having made himself acquainted with the report he laid it before his colleagues in the ministry, and that the result of their deliberations was a determination not to proceed for the forfeiture of the allotments, but to allow the future rents to be paid. Mr. *Taylor* says he thereupon told the Surveyor-General to take no action on this report, adding, "we could not afford it."

Accordingly, Mr. *D'Abedyll* paid the subsequent yearly rents in advance as they became due, viz., on the 1st of January in the years 1870, 1871, and 1872; and on the 31st of May, 1873, he paid in advance the whole of the remaining rent accruing under the lease. He paid at the same time the fees chargeable on the issue of deeds of grant.

It is not denied that the Minister for Lands was made acquainted with these payments, nor that they were paid "as rent;" and it cannot be doubted that the minister knew they were so paid.

Two receipts given by the local land agent were produced, in which the payments are described as "rents."

On the 23rd of December, 1869, a notice headed "Payment of Rents under the *Leasing Act*, 1866," was published in the *Gazette*. After giving notice to lessees living at a distance from *Brisbane* that the local land agents had been instructed to receive "the rents," it contains the following note:—

"The accompanying schedule contains all selections made under the *Leasing Act* of 1866, excepting those which have been forfeited for non-payment of rent. Rents which may be received upon such of these selections as may have been forfeited by operation of law, will be deemed to have been received conditionally, and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Act in that behalf."

The schedule contained the name of the Appellant (who was then the assignee of the lease), the allotment No. 196, and the amount due was described as "third year's rent, £40."

Similar notices were published in the *Gazette* on the 18th of November, 1870, and the 31st of October, 1871.

After the rent for the whole term of eight years had been fully

J. C. 1877

DAVENPORT v. THE QUEEN.

paid, and before the term of the lease had expired, and without an offer to refund any part of the money, this ejectment was commenced.

The writ bears date the 16th of September, 1874, and alleges the title of the Crown to have accrued on the 3rd of May, 1869, treating the lessee and his transferees as trespassers from that date.

Upon the trial of the action, in which the above facts were admitted or proved, the Judge directed the verdict to be entered for the Crown; one question only, which will be hereafter adverted to, having been left to the jury. The principal points were reserved for the consideration of the Court, which, by the judgment under appeal, sustained the verdict.

It was contended on behalf of the Appellants that there had been no failure to cultivate or improve the land at the time the ejectment was brought, because it was said the twelve months from the date of selection prescribed by the 7th section of the *Agricultural Reserves Act*, 1863, in the case of sales, was inapplicable to leases, and that lessees had the whole term of eight years to fulfil the condition. It was said that the reason for requiring the cultivation within a year in the case of sales was, that no estate being granted, nor any interest created beyond the right to have a grant in fee on the performance of the condition, it was essential that a definite time should be fixed for that performance; the scheme being, that in the event of non-fulfilment within that time, the inchoate purchase should be at an end, and the selector entitled to a return of three-fourths of the price he had paid. This reason, it was said, did not apply to the case of leases creating a legal interest for a definite term, with a right to a grant in fee on payment of the rent for the entire term; and, therefore, that the proviso in the 12th section of the *Leasing Act*, 1866, that lands in agricultural reserves, if taken up on lease, should be subject to the same condition as to cultivation as if they were selected by purchase, should be construed to apply to the obligation to cultivate only, and not to the limit of time. It was also pointed out that this limit in the first Act was only fixed by reference to the time within which a declaration was to be made by the selector in order to obtain a grant, and that a declaration was not necessary in the case of leases.

It was further contended that the 68th section of the *Alienation Act* of 1868 (which came into operation on the 1st of March of that year, during the currency of the first year of the lease in question), allowing selectors who held leases like the present to substitute improvements of the value of 5*s.* per acre in lieu of cultivation, gave the whole term of their leases for so improving their lands.

If the above construction of the statutes be correct, this action, brought during the currency of the term, would, no doubt, have been prematurely commenced.

It was further insisted on behalf of the Appellant that the proviso in the 12th section of the *Leasing Act*, 1866, did not make lessees subject to the forfeiture created by the 8th section of the *Agricultural Reserves Act*, 1863, but only to the obligation imposed by the 7th. It was urged that these sections were separable; that the condition for cesser of the interest, which was necessary to define and determine the position of a selector at the end of a year in the case of a purchase, was not necessary in the case of a lease creating a definite term, and it was pointed out that the condition for cesser was coupled with an equitable provision for the return (in the shape of land orders) of three-fourths of the purchase money, a provision inapplicable to the case of a lessee. It was said that a condition of forfeiture should be imposed in clear terms, and that the vague reference in the *Leasing Act* of 1866 to "the condition as to cultivation" in the *Sale Act* of 1863, did not subject lessees to the forfeiture prescribed in sect. 8 of that Act, and would be satisfied by holding them liable to the obligation to cultivate imposed by the 7th section.

The difficulties of construction, which these arguments undoubtedly present, arise from the inconvenient practice of legislating by means of vague and indistinct reference to the enactments of a former statute, a practice which in this case has been followed, without due regard being had to the distinctions existing between the position of purchasers and that of lessees. Their Lordships, however, do not think it necessary to determine the questions raised by the arguments just referred to, for, assuming that these arguments ought not to prevail, their opinion is in the Appellant's favour on the further question arising in the appeal.

J. C.
1877
DAVENPORT
v.
THE QUEEN.

In answer to the defence that if a forfeiture had accrued it had been waived by the receipt of rent, it was contended on the part of the Crown that the effect of the proviso in the 8th section of the Act of 1863 was to make the lease absolutely void, and not voidable only. The Supreme Court took this view, and further decided that the Legislature having imposed this condition, the Crown could not dispense with it.

It is unnecessary to decide whether, in the event of a selector by purchase failing to perform the condition, a valid grant could be made to him. Such a selector has no estate vested in him, nor any right to a grant until he has fulfilled the condition precedent as to cultivation. The distinction between the case of such a selector and that of a lessee to whom a lease has been granted, liable though it be to forfeiture, is obvious. The latter has a present estate for a definite term, an estate not created by the statute, but by a demise from the Crown. By the 5th section of the *Leasing Act* the form of lease is left to the discretion of the Governor in Council, and a duplicate of the lease is to be signed by the lessee. This provision shews that a lease by way of contract was contemplated, though based on the provisions of the statute.

In the present case the demise is for a term of years, in the usual form of a lease. Besides being made subject to the terms, conditions, penalties, and forfeitures contained in the Acts, this lease includes covenants by the lessee for the payment of the rent and observance of the clauses, conditions, and provisoes in the Acts, with a distinct covenant to cultivate one-sixth of the land within a year. There seems to their Lordships to be nothing in the form of this lease inconsistent with the Acts. The covenants afford the means of conveniently enforcing the obligations of the lessee.

Does then the proviso of forfeiture in sect. 8 of the *Reserves Act*, when read into such a lease as the present, make the term *ipso facto* void, or voidable only upon a breach of the condition? In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where

a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe* v. *Bancks* (1), *Roberts* v. *Davey* (2), and other cases in the notes to *Dumpor's Case* (3).

In *Roberts* v. *Davey* (2), the words were that the license "should cease, determine, and be utterly void and of no effect to all intents and purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present.

It is however contended that this rule of construction is inapplicable when the Legislature has imposed the condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty, his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Mr. Justice *Coltman* said: "It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view." *Malins* v. *Freeman* (4).

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established.

The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void, would of course be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to repossess the land, as indeed in the present case it was thought to be.

(1) 4 B. & A. 401.
(2) 4 B. & Ad. 664.
(3) 1 Sm. L. C. 41.
(4) 4 Bing. N. C. 395.

J. C.
1877
DAVENPORT
v.
THE QUEEN.

Again, if the lessee could treat the lease as null on his own default, he would, whilst escaping from his contract and from liability to future rent, forfeit one year's rent only, or one-eighth of what in the end would be purchase-money, instead of the one-fourth of the purchase-money, which selectors by purchase would in the like case forfeit, the latter two being entitled to a return of the other three-fourths only in the shape of land orders. This difference establishes a further distinction between such selectors and lessees.

Having regard to these considerations, the intention of the Legislature to the contrary does not, in their Lordships' view, so clearly appear as to exclude the usual and equitable rule of construction from applying to these leases. It may well have been meant to leave to the Crown, acting by its responsible ministers, the option which other lessors in the case of similar conditions are entitled to exercise.

If then the Crown could treat the lease as voidable, the further question to be considered is, has it elected so to treat it and waived the forfeiture?

On this part of the case their Lordships have felt no difficulty. The evidence of waiver seems to them to be clear and overwhelming. Not only was the rent for three successive years accepted in advance, but in 1873 the whole of the remaining rent accruing under the lease was paid up in full. And these rents were received by the officers of the Government, as appears by the evidence before set out, not only with full knowledge of the breach of the condition, but in consequence of the decision of the ministers of the Crown in the colony, come to after mature deliberation, that the Government of the colony wanted the money and could not afford to insist upon the forfeiture.

It was sought to obviate the effect of these receipts by referring to the passage contained in the "notification of rents due," set out above. This notification appeared in the *Gazette* in three successive years, the last year being as far as appears 1871. After that year the publication was apparently abandoned. It is therefore very doubtful whether this notification can in any way affect the acceptance in the year 1873 of all the rent then remaining due.

But, supposing this notice is to be regarded as pointing to all

future rents, their Lordships think it would not prevent the acceptance of these rents from operating as a waiver. The notification itself describes the payments as "rent," and their Lordships have no difficulty, upon the evidence before adverted to, in coming to the conclusion of fact, that the money was not only paid, but received as "rent."

A question of this kind received great consideration in the House of Lords in *Croft* v. *Lumley* (1). In that case the facts were much more favourable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the Judges, except Mr. Justice *Crompton*, was that the receipt of the money under these circumstances operated as a waiver. In the present case the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. Lord *Wensleydale*, who was disposed to agree with Mr. Justice *Crompton* in his conclusion of fact in the particular case, appeared to have no doubt that when money is in fact received as rent the waiver is complete. A very learned Judge, Mr. Justice *Williams*, gave his opinion in the following terms: "It was established as early as *Pennant's Case* (2) that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent; he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them."

Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say

(1) 6 H. L. C. 672.

(2) 3 Rep. 64 a.

J. C. 1877 DAVENPORT v. THE QUEEN.

that where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

The finding of the jury that there was no waiver appears from the notes of the learned Judge who tried the cause to have been founded on his direction, "that the intention of the party receiving the rent, and not of the party paying it, must be looked at in considering the question of waiver, and that unless the jury were of opinion that the rents were received after the 23rd of May, 1869, unconditionally and unreservedly, they should find no waiver." In their Lordships' view of the law, which has just been stated, this direction is erroneous. They do not, however, deem it necessary to send down the case for a new trial, because the question of waiver really depends on undisputed facts, from which the proper legal inference to be drawn is, in their opinion, clear. Even if the evidence of the receipt of the money as rent had been less convincing than they have found it to be, they would have hesitated to come to the conclusion that the ministers of the Crown took this money wrongfully and without any colour of right, as they would have done if it had not been accepted as rent.

Upon a review of the whole case, therefore, they are of opinion that the verdict ought to be entered for the Defendant.

After coming to this decision it is unnecessary to determine the effect of the certificate of "fulfilment of conditions" given to the Appellant by the Commissioner of Crown Lands. Such a certificate, if it be in proper form and good and sufficient upon its face, may for some purposes be conclusive. But it was contended that defects both of form and substance were disclosed upon the face of the above certificate which precluded the Appellant from relying on it. Without expressing any opinion on these objections, it is enough to say that the Appellant is entitled to succeed in the present action without the aid of this certificate.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, discharging the rule *nisi* of the 11th of December, 1874, and, instead thereof, to direct that such rule be made absolute to set aside the verdict

found for the Plaintiff, and to enter the verdict for the Defendant, with costs.

The Defendant (Appellant) will also have the costs of this appeal.

J. C.
1877
DAVENPORT
v.
THE QUEEN.

Solicitors for the Appellant: *Cunliffe & Beaumont.*
Solicitors for the Respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

WILLIAM HENRY WILLANS AND OTHERS APPELLANTS;
AND
SIR HENRY AYERS AND OTHERS . . . RESPONDENTS.
(TRUSTEES OF THE INSOLVENT ESTATE OF P. LEVI & CO.)

J. C.*
1877
Nov. 13, 14;
Dec. 10.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Bills of Exchange drawn and accepted by the same Parties—Custom—Re-exchange.

11 C.L.D. 318

Although bills of exchange, drawn and accepted by the same parties, may be in strictness promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is clear, both the holders and the parties may treat them accordingly.

A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when bills are returned from the colonies dishonoured, however valid in law, does not apply in the absence of an agreement, express or implied, to allow re-exchange.

Where the holders of bills drawn by *P. L. & Co.* in *London* on *P. L. & Co.* in *Australia*, having no occasion to transfer money from *London* to *Australia*, sent them to the latter country, not for the purpose of employing the proceeds there, but of having them remitted to *London*, the dishonour of such bills does not entitle the holders to recover damages by way of re-exchange.

The right to "re-exchange," in the absence of express agreement, arises when the holder of a bill who has contracted for the transfer of funds from one country to another has sustained damages by its dishonour through having to obtain funds in the country where the bill was payable. "Re-exchange" is the measure of those damages.

APPEAL from an order of the Supreme Court of *South Australia* (Dec. 19, 1876), dismissing an appeal by the above-named Appel-

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1877 WILLANS v. AYERS.

lants from so much of an order of the Court of Insolvency of that place (Dec. 21, 1875), as rejected the Appellants' claim to rank as creditors of the joint estate of *P. Levi & Co.* for the sum of £4000 in respect of re-exchange.

The facts of the case are fully set forth in the judgment of their Lordships.

By an agreement dated the 11th of August, 1873, made between the Appellants of the one part and the Respondents of the other part, after a recital that a suit was then depending in the Supreme Court wherein the Appellants were the Plaintiffs and the Respondents and the members of the said firm of *Philip Levi & Co.* were the Defendants, it was witnessed (among other things) as follows: "Firstly, the Plaintiffs shall rank as creditors on the estate of *Philip Levi & Co.* for £34,733. 8*s.* 10*d.*, whereon a dividend of 17*s.* 6*d.* in the pound shall be paid within one week from the execution of this agreement. . . . Fourthly, the parties of the one part may be allowed to apply to the Court of Insolvency to be allowed to prove in respect of re-exchange charged by them. Fifthly, there shall be an appeal from any decision of the Court of Insolvency to the Supreme Court or any other appellate tribunal having jurisdiction in insolvency in manner provided by the laws of insolvency. . . . Seventhly, after payment of the dividend mentioned in paragraph 1 hereof, the above recited bill in equity is to be dismissed as regards the said *Philip Levi*, *Edmund Levi*, and *Frederick Levi*, with costs to be paid by the Plaintiffs, and as regards the other Defendants without costs."

Mr. *J. D. Wood*, for the Respondents, raised a preliminary objection that no appeal lay in this case. By the *Insolvent Act*, 1860, sect. 14, an appeal to the Supreme Court is given to persons dissatisfied with the determination of the Court of Insolvency on a point of law, or the admission or rejection of evidence. By sect. 17 it is provided that "The decision of the Supreme Court on the hearing of any appeal shall be final and conclusive, and no appeal shall be allowed therefrom to the Court of Appeals." By the *Insolvent Further Amendment Act*, 1870 (33 Vict. No. 3, sect. 5), the right of appeal is extended so as to apply to determinations in respect of a matter of fact, as well as of law. He sub-

mitted, first, that the Judicial Committee of the Privy Council was not an "appellate tribunal having jurisdiction in insolvency" within the meaning of the fifth clause of the agreement, and that the parties to the agreement intended that there should be an appeal only to the Supreme Court or to any Court of Appeal which might be established by the Legislature of *South Australia*. Secondly, that sect. 17, above referred to, prevented an appeal being brought from judgments of the Supreme Court pronounced upon appeals to it from the Court of Insolvency.

Mr. *Benjamin*, Q.C., for the Appellants, on the first point, contended that the right of appeal was not taken away by the agreement, and referring to the Order in Council of the 9th of June, 1860, contended that it was unnecessary for the parties to say more than they did. He was not called upon in reference to the second point.

SIR JAMES COLVILE:—Their Lordships consider that this objection can prevail on neither ground. The right of appeal is not taken away by the local statute. If it had been the intention of both parties to the agreement to exclude such right, they could have done so by apt words. No such intention, however, is evidenced by the agreement.

Mr. *Benjamin*, Q.C., and Mr. *A. L. Smith* (Mr. *Asquith* with them), for the Appellants:—

The orders of the 21st of December, 1875, and 19th of December, 1876, ought to be reversed, and the Appellants should rank as creditors of *P. Levi & Co.*, for £4000, and are entitled to any dividends that have accrued due thereon, with interest and costs. The short point is, whether there is a claim for re-exchange in respect of bills of exchange drawn in *London* for acceptance in *Australia* and dishonoured. The evidence established a custom in the Australian trade whereby the holders for value of bills of exchange drawn by houses and firms in *England* on houses and firms in *Australia* were during the year 1866 on the dishonour of such bills, either by non-acceptance or non-payment, entitled to be paid by the drawers thereof, in lieu of unliquidated damages, a

J. C. 1877 WILLANS v. AYERS.

certain liquidated sum or fixed percentage, that is to say, 20 per cent. on the amount of such bills as an indemnity for costs of re-exchange, and other charges and damages incurred by reason of such dishonour. The bills were drawn, received, and held under and subject to the custom. With regard to these bills having been drawn by persons in *London* upon themselves in *Australia*, although such an instrument may be declared upon as a promissory note, yet there are distinct authorities for treating them as bills. See *Robinson* v. *Bland* (1); *Ex parte Parr* (2); *Harvey* v. *Kaye* (3); in which case *Bayley*, J., referred to a case of *Magor* v. *Hammond*, never reported elsewhere, in reply to *Campbell arguendo*, see p. 364. Reference was also made to *Goodwin* v. *Robarts* (4), see judgment of *Cockburn*, C.J., p. 346, and also 1 App. Ca. 488, judgment of Lord *Cairns*. Further by the French law, see *Pardessus, Code de Droit Commercial*, vol. ii. sect. 335, bills drawn by a house of business in one country upon a house of business in another country are treated as bills, notwithstanding the identity of drawers and drawees.

If the custom is not established by the evidence, or held not to apply to this particular transaction, it was submitted that the Appellants were entitled to have the case remanded for the amount of re-exchange or damages to be assessed by virtue of the *Insolvent Amendment Act*, 1867 (*South Australia*), s. 15.

Sir *H. James*, Q.C., and Mr. *J. D. Wood*, for the Respondents:—

The four instruments alleged to be bills of exchange are not bills of exchange, so as to entitle the holders to claim re-exchange upon their dishonour. A person who draws on himself makes a promissory note rather than a bill. It is a promissory note in all its incidents except the bare words used. He simply makes a promise to pay, and the contract is not complete till acceptance: see *Miller* v. *Thomson* (5). [SIR MONTAGUE E. SMITH referred to *Edis* v. *Bury* (6).] It is not contended upon the other side that a claim to re-exchange arises in the case of a promissory note.

Assuming the instruments to be bills of exchange the claim of

(1) 2 Burr. 1077.
(2) 18 Ves. 69.
(3) 9 B. & C. 356.
(4) Law Rep. 10 Ex. 337.
(5) 3 M. & G. 576.
(6) 6 B. & C. 433.

the Appellants was rightly rejected, relying as they did upon the alleged custom in support of it. Further, they received in *Australia* whatever was recoverable in respect of the bills, and therefore no claim to re-exchange arose. However that may be, the custom is invalid, does not exist in fact and was not proved by evidence, and is bad in law. Even if valid it does not apply to bills of exchange which were taken in payment of an antecedent debt, and had never been discounted or negotiated by the holders of them. It is contended that the custom was invalid. A custom to pay damage not actually sustained is a bad custom: *Suse* v. *Pompe* (1). One of the terms annexed by law to the contract executed by drawing and indorsing a foreign bill of exchange is, that if the bill be dishonoured the indorser will pay to the holder, in addition to the costs of protesting the bill, the amount which it would cost to purchase in the country where the bill is dishonoured, a bill for a like amount upon the country where the bill dishonoured was drawn; whereas a percentage fixed by custom may be greater or less than the amount which it would cost to purchase such a bill. It is impossible to add by custom to a contract a condition inconsistent therewith. Reference was made to *Burges* v. *Wickham* (2); *Woodruff* v. *Merchants' Bank of New York* (3); *Frith* v. *Barker* (4); *Goodwin* v. *Robarts* (5). Reference was also made to *Francis* v. *Rucker* (6), to *Kent's* Commentaries [12th Ed.] vol. iii., marg., p. 115–120, and *Hendricks* v. *Franklin* (7). Lastly, assuming that either by reason of the invalidity of the custom, or its non-applicability to the bills in question, the Appellants were not entitled to a liquidated amount of damage in lieu of re-exchange, then the damages being unliquidated were not provable under the insolvency law of *South Australia*, as it was at the date of the deeds of arrangement of the 19th of September, 1866, and 23rd of February, 1867, *i.e.*, under the *Insolvent Act* of 1860: see 23 & 24 Vict. No. 16, s. 249. No debt was due here on the insolvency of the drawers; the

(1) 8 C. B. (N.S.) 538.
(2) 33 L. J. (Q.B.) 28; 3 B. & S. at pp. 696, 697.
(3) 25 Wendell, 673.
(4) 2 Johnson's N. Y. Rep. 327, 335.
(5) Law Rep. 10 Ex. 337.
(6) 2 Amb. 671.
(7) 4 Johnson's N. Y. Rep. 119.

J. C. 1877 WILLANS v. AYERS.

damage might or might not accrue according as the acceptors paid or not. The *Insolvent Amendment Act*, 1867 (31 Vict. No. 13), s. 15, provides for the assessment of unliquidated or unascertained damages, but that Act was not in force at the date of the deeds above-mentioned, and was not retrospective. [Mr. *A. L. Smith*:— The law of bankruptcy at that date was similar to that in *England* in 1849. I cannot prove for unliquidated damages, but I can prove a debt due on a contingency.] As to that, see *Archbold's* Law of Bankruptcy by *Griffiths* and *Holmes* [1867], vol. i. p. 611; *Anon.* (1); *Ex parte Moore* (2).

Mr. *A. L. Smith*, in reply:—

As respects the recovery of dividends in *Australia*, and the effect of such payments on the claim to re-exchange, the Appellants were entitled to rank as creditors for whatever they might have proved against the *London* house under a bankruptcy in *London*. The custom relied on by the Appellants is not invalid by reason of its importing into a contract an obligation to pay a fixed sum by way of liquidated damages in lieu of what would have been legally recoverable under it in respect of re-exchange calculated in the ordinary way.

He referred to *Auriol* v. *Thomas* (3); *Francis* v. *Rucker* (4); *Forbes* v. *Marshall* (5).

1877 Dec. 10.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The question raised by this appeal is whether the Appellants ought to have been allowed to prove against the estate of Messrs. *Philip Levi & Co.*, when in the course of administration as an insolvent estate in the colony of *South Australia*, a sum of £4000, under the head of re-exchange, in addition to the sum for which they had been admitted to rank as creditors.

(1) 1 Atk. 140.
(2) 2 Bro. Ch. Ca. 597.
(3) 2 T. R. 52.
(4) 2 Amb. 671.
(5) 11 Ex. 166.

In and previous to 1866, the Appellants, carrying on business in *London* as wool-brokers, under the style of *Willans, Overbury, & Co.*, had large dealings with *Philip Levi, Edmund Levi, Frederick Levi,* and *Alfred Watts,* who were merchants carrying on business in partnership both at *Adelaide,* in *South Australia,* and in *London,* under the style of *Philip Levi & Co.*

According to the course of dealing between the two firms, *Willans, Overbury, & Co.* were in the habit of accepting bills drawn by *Philip Levi & Co.* against wools to be consigned by them, the amount of such acceptances being regulated by the assumed value of the clip of a particular year; *Philip Levi & Co.* being, moreover, under engagement to keep *Willans, Overbury, & Co.* out of cash advance in respect of their acceptances.

In the month of May, 1866, and during the commercial panic and crisis of that year, a considerable balance was due from *Philip Levi & Co.* to the Appellants in respect of former transactions; and the latter had also to meet acceptances, which would fall due at various dates between the 25th of May and the 23rd of June, amounting in the whole to £37,000; there being, as was then estimated, a deficiency in the value of wools against which those acceptances had been given of no less than £25,000; and the *London* house of *Philip Levi & Co.* having no other present means of putting the Appellants in funds.

In these circumstances the Appellants agreed to give further accommodation to *Philip Levi & Co.* upon certain terms which were finally embodied in the agreement of the 26th May, 1866. That document purports to be made between *Philip Levi* and *Alfred Watts,* of *Adelaide, Frederick Levi* and *Edmund Levi,* of *Charlotte Row,* in the City of *London,* merchants and copartners, trading under the style of *Philip Levi & Co.*, and the Appellants. It contains various stipulations for the protection and security of the Appellants; but the only one that is material to the present question is the third, which is in these words: "That at the request of the said *Willans, Overbury, & Co.* the said *Frederick Levi* and *Edmund Levi* shall draw from time to time bills of exchange upon the said *Philip Levi* and *Alfred Watts,* for acceptance and payment by them, for such amount and at such dates as

J. C. 1877 WILLANS v. AYERS.

the said *Willans, Overbury, & Co.* shall require and think fit to cover the said sum of £20,000."

Accordingly the Appellants paid their acceptances as they fell due, charging *Philip Levi & Co.* in account with the amount; and, on the other hand, the *London* partners of *Philip Levi & Co.*, in pursuance of the above clause in the agreement, drew four bills of exchange for £5000 each. All of these purported to be drawn by *Philip Levi & Co.* in *London*, upon Messrs. *Philip Levi & Co.*, *Adelaide*, to the order of *Willans, Overbury, & Co.* Two bore date the 24th of May, 1866, and were, the one at sixty, the other at ninety days' sight. The other two were dated the 1st of June, and were both at ninety days' sight. *Philip Levi & Co.* were credited in their account current with the Appellants with the amounts of the four bills, less certain sums aggregating £2350, which were calculated, in the case of the sixty days' bill, as "exchange at 11 per cent.," and in the case of the other bills, as "exchange at 12 per cent." After receiving credit for these sums, *Philip Levi & Co.* remained indebted to the Appellants on the balance of their account current, as made up to the 30th of June, 1866, in the sum of £24,952 16*s.* 3*d.*

The four bills, after an ineffectual attempt to negotiate them in *London*, were sent by the Appellants out to *Australia*, where they were all dishonoured. The May bills were accepted, but not paid. The others were neither accepted nor paid. All were duly protested, and apparently were, after dishonour, returned to the Appellants in *England.*

The *Adelaide* firm of *Philip Levi & Co.* stopped payment about the 12th of September, 1866, and it may be taken that, under and by virtue of the three deeds dated respectively the 17th of September, 1866, the 23rd of February, 1867, and the 31st of January, 1868, which are set forth in the Record, the joint and separate estates of all the partners in the firm, whatsoever and wheresoever, became vested in the Respondents, for the purpose of being distributed for the benefit of their creditors, as provided by the Australian Statute intituled the *Insolvent Act*, 1860. There was afterwards litigation between the Appellants, claiming as secured creditors, and the Respondents, the trustees, but this

was finally compromised by an agreement in writing dated the 11th of August, 1873, whereby it was arranged that the Appellants should rank as creditors on the estate of *Philip Levi & Co.*, for £34,733 8*s.* 10*d.*, and for interest on current account up to the 17th of September, 1866, with liberty to make further proof touching certain commissions claimed by them which are no longer in dispute; and also, "to apply to the Court of Insolvency to be allowed to prove in respect of the re-exchange charged by them; with an appeal from the decision of the Court of Insolvency to the Supreme Court, or any other appellate tribunal having jurisdiction in insolvency, in manner provided by the laws of insolvency."

Accordingly the Appellants did apply to the Court of Insolvency, praying, amongst other things, that the trustees might be ordered to pay them a dividend on £4000, the amount of the sum claimed for re-exchange on the four dishonoured bills for £5000 each. Their claim was, however, rejected by the Commissioner in Insolvency, and his decision was, on appeal, confirmed by the Supreme Court by an order dated the 19th of December, 1876. Against the latter order the present appeal is preferred.

In the course of the argument before their Lordships, an objection was taken to the Appellants' claim, which it is convenient to consider *in limine*. It was suggested that, inasmuch as by the original contract the Appellants were to receive their money in *Adelaide*, and did ultimately receive there what was recoverable in respect of the bills, there can be no foundation for a claim for re-exchange. To this it was answered that the place in which the estate of the insolvents was administered was determined by their own act in executing the trust deeds, and thereby vesting all their assets, wheresoever situate, in trustees in *Adelaide;* that the rights of the creditors of the *London* house could not be diminished by their being thus compelled to follow the assets, English as well Australian, to *Australia*; but that they were entitled to rank as creditors for whatever they might have proved against the *London* house under a bankruptcy in *London*.

Their Lordships are disposed to accede to this argument. On the other hand, it is now admitted that, by the law of *South Australia*, there can be no proof, in respect of re-exchange or

J. C. 1877. WILLANS v. AYERS.

otherwise, for damages unliquidated at the date of the insolvency, and consequently it lies upon the Appellants to establish that, by virtue of a special custom peculiar to the trade between *London* and *Australia*, and recognised in *London* as qualifying the general law merchant, the Appellants, upon the dishonour of the bills, or at least upon their return to *London*, were entitled, as against the drawers, to add 20 per cent. as a liquidated sum to the amount of those bills, and thus became, *ipso facto*, creditors of the *London* house of *Philip Levi & Co.* for £24,000, instead of £20,000.

To this somewhat startling conclusion various objections have been taken. They are thus summarized by the first three of the reasons submitted by the Respondent's case, which are as follows:—

1. Because the four instruments alleged to be bills of exchange are not bills of exchange so as to entitle the holders to claim re-exchange upon their dishonour.

2. Because the custom relied upon by the Appellants is invalid, does not exist in fact, and is bad in law.

3. Because, even if it is good and valid, it does not extend to bills of exchange taken under such circumstances as existed with reference to the four instruments in question.

If the first of these objections be founded, as their Lordships take it to be, on the broad fact that the drawers and drawees of the alleged bills are the same persons, and consequently that the documents are not in the strict and proper sense of the term bills of exchange, but rather of the nature of promissory notes (a consideration upon which the Supreme Court seems mainly to have proceeded), their Lordships are not prepared to dispose of this appeal upon that ground. The circumstance in question, as will subsequently be shewn, may have some influence on their decision; but it does not, in their opinion, constitute in itself a complete or sufficient *ratio decidendi*. There is no doubt some authority for the proposition that such instruments are in strictness rather promissory notes than bills. But the passage cited from *Pardessus, Cours de Droit Commercial*, tom. ii., Art. 335, shews that the French law makes a distinction where the document purports to be a bill drawn by a house of business in one country upon a house of business in another country, and would treat it as a bill of

exchange, notwithstanding the identity of the persons carrying on business in the two establishments. And in this country there are authorities to shew that although the holder of such an instrument may at his election treat it as a bill of exchange or as a promissory note, the drawer might be estopped from alleging that it was not a bill of exchange upon the principle applied to foreign scrip in *Goodwin* v. *Robarts* (1). Nor does it seem to be essential that the holder should be a subsequent indorsee for value. The same rule may well apply to the original parties, if it be clear on the evidence, as it is here, that it was the intention of the one to give, and the other to receive, a document capable of being negotiated as a bill of exchange in the market.

Then what is the alleged custom upon which the Appellants rely, and what the proof of its existence?

The first statement of the custom is to be found in the following passage in the first affidavit of the Appellants:—

"We are informed and believe that at a meeting held in May, 1846, of the *New South Wales and Van Diemen's Land Commercial Association*, which was a body of merchants engaged in trade with *Australia*, associated for the purpose of considering questions connected with such trade, a report of the committee was read, which contained the following passage: 'The very great importance of having an established custom in the trade as to a fixed percentage for exchange, re-exchange, and interest in cases where bills may be returned from the Colonies dishonoured, early occupied the attention of your committee, and it appearing to them that 20 per cent. would be a fair and equitable consideration to cover all contingencies, they recommended its adoption to the members through a circular issued by the secretary, and the subscribers having approved the measure, confirmed the same by affixing their signatures to a copy of the resolution of the committee to that effect, and that the said report was adopted."

So far the alleged custom would appear to have been established only since 1846, and to have originated in the act of an association whose authority in effecting an alteration of the law merchant of this country could bind only those who had agreed, in the manner stated or otherwise, to be so bound.

(1) Law Rep. 1 App. Ca. 476, see p. 490.

J. C. 1877 WILLANS v. AYERS.

In some of the other affidavits, as, *e.g.*, in that of Mr. *Taylor*, the managing director of the Bank of *Victoria*, and in that of Mr. *Henry Monks*, the secretary of the *English, Scottish, and Australian Chartered Bank;* nothing is said of the resolution of the committee. The latter states broadly:—

"It is now, and was in the year 1866, and for many years previously had been, a well-known and thoroughly established custom that the holder for value of bills drawn in *England* upon any place in any of the colonies of *Australia* was entitled to claim from the drawer of such bills, if they were eventually returned dishonoured either for non-acceptance or non-payment in *Australia*, in addition to the amount of such bills, a certain liquidated amount or fixed percentage in lieu of re-exchange and other charges; and further, that throughout the year 1866 the commission or liquidated damages so payable, in the absence of a special agreement fixing the rate, was 20 per cent. on the amount thereof, and was so fixed by invariable custom and usage of the parties engaged in the Australian trade."

Mr. *Purdy*, however, the manager of the Bank of *South Australia*, states, that the fixed rate of re-exchange has, since 1866, been reduced to 10 per cent. (he does not say when or how); a reduction which implies an authority somewhere to vary, at least as to amount, what is elsewhere stated to be "a fixed and invariable custom and usage."

Other witnesses, as *e.g.*, Mr. *Graham*, and Mr. *Sichel*, depose that the same custom obtains in *Australia* with respect to bills drawn in *Australia* upon *England*, and returned thence dishonoured.

To the custom thus stated, it is objected that it is bad in law because inconsistent with the nature of re-exchange; and that evidence is not admissible to prove an unexpressed condition which is inconsistent with what is either expressed or implied by law in the contract. And as authorities in support of this proposition, the judgment of Mr. Justice *Blackburn* in *Burges* v. *Wickham* (1), and the decision in *Suse* v. *Pompe* (2), were cited. In the latter case, wherein the nature of re-exchange and of the right to it was very clearly explained by Mr. Justice *Byles*, it was ruled that the Court

(1) 3 B. & S. 696, 697. (2) 8 C. B. (N.S.) 538.

could not act on evidence of an alleged custom to the effect that the holder of a dishonoured bill might at his option claim either the sum which he had paid for the bill or re-exchange, computed in the usual way, from the drawer. It was further urged that although what is termed re-exchange may comprise expenses of protest and other charges which may be constant quantities, it must at least vary with the current rate of exchange; whereas, under the custom set up, the drawer of a bill in *London* and the drawer of a bill in *Australia* would have to pay the same fixed percentage by way of penalty on the dishonour of his bill, although the bills were dishonoured on the same day when the rate of exchange, if in favour of the one country, would necessarily be against the other. Their Lordships are by no means prepared to say that there is not considerable force in these objections. Looking, however, to the fact that in other countries, and notably in *America*, the practice of allowing a fixed sum by way of liquidated damages, in lieu of re-exchange calculated in the ordinary way, has been recognised by the Courts, even where it depended on usage, and had not been sanctioned, as in some of the *United States* it has been, by statute; looking also to the fact that in *Auriol* v. *Thomas* (1) Mr. Justice *Buller* appears to have recognised such a custom in the case of *East India* bills as unobjectionable; their Lordships are not prepared to pronounce the alleged custom invalid in law on the face of it. Whether its existence has been satisfactorily proved is another question.

Upon this point their Lordships cannot say that the evidence before them establishes the existence of a custom varying the general law merchant, in a manner altogether satisfactory to their minds. The record, no doubt, contains the affidavits of a good many persons of respectability, all of whom concur in stating that the alleged usage exists in the case of trade bills of exchange. None of these persons, however, has been subjected to cross-examination; a process peculiarly desirable where the thing to be proved is invariable or even general usage or custom. Their Lordships do not doubt that the so-called custom has been voluntarily acted upon in many instances, but they have not been referred to any case in which it has been found by a jury, or

(1) 2 T. R. 52.

J. C. 1877 WILLANS v. AYERS.

recognised by a Court of Justice, as an established usage of trade, varying the general law merchant. Their Lordships, however, do not feel compelled either to affirm or to disaffirm, by their decision in this case, the existence of the alleged custom, or its validity in law, because they have come to the conclusion that, if it exists, it has not been shewn to govern a transaction such as that which is here in question.

The Appellants had to satisfy the Court that at the date of the insolvency they had a right to add £4000 to the amount of the bills, by reason of the right to re-exchange at the customary rate being necessarily an implied incident in their contract with the insolvents as drawers.

It is to be observed, however, that there is a conflict of evidence even amongst the witnesses who came to depose to the existence of the alleged custom upon this point. Some of them, and these from their position as bank agents are of considerable weight, limit its application to bills of exchange drawn in the usual form and in the ordinary course of trade, and deny that it applies to the documents and transactions in question. On the other hand, the greater number of the witnesses assert the contrary. It was said at the Bar that these discrepant statements were mere matters of opinion. That may be true, but the conflict at least shews that the custom is not universally admitted by those engaged in or conversant with the trade between *England* and *Australia*, to apply invariably to every document that assumes the form of a bill of exchange.

Their Lordships are of opinion that the distinction taken by the witnesses who impugn the Appellants' right is reasonable and in itself decisive of the case.

If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonour of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to "re-exchange," which is the measure of those damages.

In the present case the Appellants, having no occasion to transfer money from *London* to *Adelaide*, but seeking, on the other hand,

to be put in funds by *Philip Levi & Co.* in *London*, take from the latter certain instruments, which they might at their option (and their right cannot be put higher) treat as bills of exchange or as promissory notes. Failing to raise money on these in *London*, they, according to their own account, send them out to *Adelaide*, in the hope of being able to negotiate them there, not, however, for the purpose of employing the proceeds there, but of having them remitted to *London*. If the documents are to be treated as promissory notes, there is, of course, no right to re-exchange. But let it be assumed that by the contract between the parties they were to be treated, even whilst they remained in the Appellants' hands, as bills of exchange. If so, failure to accept might have remitted the Appellants to their original rights against *Philip Levi & Co.*, and enabled them to pursue at once the remedies which had been suspended by taking the bills. But it appears to their Lordships that, in the peculiar circumstances of this case, the dishonour of the bills did not entail upon the Appellants damages to the liquidation of which the custom was intended to apply.

It is, of course, unnecessary to consider what would have been the consequences of the negotiation of the bills in this country; whether the holders might have acquired a right to re-exchange against the Appellants as indorsers, and whether the Appellants might have had a remedy over against *Philip Levi & Co.* as drawers. There was no such negotiation; the bills remained in the Appellants' hands, and, in order to establish their case, it is necessary to make out that the consequence of re-exchange at the customary rate was in the contemplation of the parties at the time of the contract; or, in other words, that *Philip Levi & Co.* contracted that, in the event of the dishonour of the bills by their *Adelaide* firm, they would allow that re-exchange, by way of penalty, as an item in their account with the Appellants, thus increasing the amount for which the bills were given by £4000.

Of such an agreement on the part of *Philip Levi & Co.* there is no direct proof, and their Lordships have already shewn that it is not, in their opinion, necessarily to be inferred from the form of the documents, the circumstances of the case, or the evidence of the custom, whatever may be the weight to be attached to the last.

J. C. 1877 WILLANS v. AYRES.

They will, therefore, humbly advise Her Majesty to affirm the Order of the Supreme Court of *South Australia*, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Trinder & Curtis Hayward.*
Solicitors for the Respondents: *Torr & Co.*

[PRIVY COUNCIL.]

J. C.* 1877 *Nov.* 14, 15, 16, 17, 20; *Dec.* 10.

DAME HARRIET MORRISON AND OTHERS PLAINTIFFS;

AND

MAYOR, ALDERMEN, AND CITIZENS OF MONTREAL . . . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR QUEBEC, CANADA.

Expropriation—Report of Commissioners not final—Action to augment Indemnity—27 & 28 *Vict.* c. 60—35 *Vict.* c. 32, s. 7.

Although a report of Commissioners appointed under Colonial Act, 27 & 28 Vict. c. 60, to fix the compensation payable for expropriated lands, is no longer final, having regard to 35 Vict. c. 32, s. 7, it must, nevertheless be considered correct until it is proved to be erroneous.

In an action under that section to augment the amount of indemnity for expropriated lands, *held*, that the *onus* lay on the Plaintiffs to prove that the report was erroneous in itself and not merely with reference to the evidence adduced before the Commissioners.

Bagg v. *Mayor of Montreal* (1) approved.

THIS appeal arose out of the compulsory taking of land by the Corporation of *Montreal*, of an estate belonging to the Appellants, called the *Mount Tranquil* estate, for the purposes of *Mount Royal Park*, provision for forming which was made by *Quebec* Statute, 32 Vict. c. 70.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 19 Low. Can. Jur. 136.

The sections of the local Acts material to the questions raised in this appeal are set out in the judgment of their Lordships.

On the 26th of June, 1873, the Commissioners made their report, fixing the amount of compensation at $210,000, and on the 5th of July, *Torrance*, J., gave a formal judgment homologating the report.

On the 18th of the same month the Appellants sued the Respondents, and after declaring that the Commissioners had fallen into error upon the amount of indemnity to which they were entitled, and that the true value of the estate for the purposes of expropriation was $329,920 in excess of the sum awarded, prayed to recover that sum with interest from the date of notice of intention to take the land and costs.

The Respondents pleaded that there was an error in the award.

The parties then proceeded to *enquête*, and on the 27th of February, 1875, the Superior Court gave judgment for the Appellants for $245,000 in excess of the sum awarded; but on the 22nd of June, 1876, the Court of Queen's Bench (*Dorion*, C.J., *Sanborn*, and *Tessier*, JJ., *Monk*, and *Ramsay*, JJ., dissenting), reversed, with costs, this judgment, and dismissed the Appellant's action, and also a cross appeal by them seeking still further to enhance the amount of compensation.

Mr. *Matthews*, Q.C., and Mr. *Bompas*, Q.C., for the Appellants denied that the true construction of 35 Vict. c. 32, s. 7 (*Quebec* Statutes) was that it only gave a right of action in cases where the Commissioners had fallen into some error in the principle of their valuation, and contended that the right accrued in any case where the party expropriated was dissatisfied with the amount awarded. The Appellants were at liberty to sue, according to that section, to recover the difference between the amount awarded and the amount claimed, just as if the corporation had paid the money into Court under a Judge's order in an action for the price of land: see *Bagg* v. *Mayor of Montreal* (1); *cf.* 37 Vict. c. 51, s. 176 (*Quebec*), which makes no alteration in the law except by omitting the provisions of 27 & 28 Vict. c. 60, ss. 10, 11; an omission which was due to the circumstance that such provisions

(1) 19 Low. Can. Jur. 136.

J. C. 1877 MORRISON v. MAYOR, &c., OF MONTREAL.

had become unnecessary, the report having by 35 Vict. c. 32, become a mere provisional valuation for the purposes of expropriation, not in any way affecting the parties' right of suit: see also 27 & 28 Vict. c. 60, s. 13, cl. 7.

The Commissioners had made error in law in their mode of estimating the property: see *Mayor of Montreal* v. *Brown and Springle* (1). The prospective capabilities of the land ought to have been taken into consideration.

They further argued that on no reasonable construction of the statute could the award be deemed to be *primâ facie* correct, unless shewn to be erroneous, especially when the Commissioners had been called to explain it. On the evidence in the cause the amount awarded ought to have been enhanced, as prayed in the cross appeal to the Queen's Bench. The amount ought to include compensation for compulsory purchase, loss by having to part with the property at that time, and the costs and expenses to which the Appellants were put in consequence of being turned out: see *Dalloz*, "Expropriation," Div. 1, c. 7, Arts. 572, 574.

Mr. *Benjamin*, Q.C., and Mr. *Wills*, Q.C., for the Respondents:—

The enactments in question are peculiar, and it is not easy to give to the expression "error upon the amount of the indemnity only on the part of the Commissioners" any meaning which does not render the provisions in question, taken as a whole, anomalous and inconsistent, but it certainly seems a contradiction in terms to say that the award of the Commissioners "shall be final as regards all parties interested, and consequently not open to any appeal for the purposes of expropriation," and then to provide, as the Appellants contend has been done, that in every case in which either party is dissatisfied with the amount awarded there shall be a fresh investigation before a fresh tribunal and upon fresh materials. We submit that the enactment must receive a more limited construction, and that the right to proceed by direct action must, at any rate, be confined to cases in which it can be shewn that the Commissioners ought to have come to some other conclusion than that to which they did in fact come, either by reason of their having made some mistake in principle, or in accepting

(1) 18 Low. Can. Jur. 146; Law Rep. 2 App. Cas. 168.

or rejecting evidence, or having found, to use an expression familiar to English lawyers, a verdict against the weight of the evidence.

In the present case no such miscarriage took place. Mr. Justice *Johnson* says that Mr. Justice *Torrance* observed in a similar case that the Commissioners were better judges than he of the value of the land. He adds, "They may be, and I should be disposed to say the same thing in the present case if I had before me only the same means of arriving at a conclusion that the Commissioners had," and he proceeds to base the judgment, by which he more than doubled the amount they had awarded, upon the fact that a great deal of evidence was before him that was not before the Commissioners, as well as upon the fact that they had evidently "acted upon something known only to themselves, and not disclosed by the witnesses;" in other words, that they had had the advantage of personal inspection and examination of the property, which they were by law entitled and bound to make, and which he could not make, as well as of bringing to bear on the question their own great personal knowledge and experience as to the value of property. How can they be said to have "fallen into error" (see Statute of *Quebec*, 27 & 28 Vict. c. 60, s. 13, subs. 5; Code of Civil Procedure, ss. 322, 330, and the form of oath appended) when the learned Judge who so decides intimates that he has only come to a different conclusion because a quantity of evidence was before him which had been deliberately withheld from the Commissioners, and because he had been unable to check and gauge that evidence by personal examination of the property in question.

It is submitted further, that even if it were competent to the Appellants, by fresh evidence or otherwise, to convince a Judge of the Superior Court that the Commissioners had awarded too small a sum, and if that state of things be enough to satisfy the statute and to make a case of "error on the part of the Commissioners," there is nothing in the evidence in this case to lead to the conclusion that the majority of the Court of Queen's Bench were wrong in holding that the decision of the Commissioners was more likely to be correct than that of Mr. Justice *Johnson*. Even the dissentient Judges of the Court of Queen's Bench both of them thought that Mr. Justice *Johnson* had put a high estimate upon

J. C. 1877 MORRISON v. MAYOR, &c., OF MONTREAL.

the property, and yet he is far below the amounts given by the witnesses for the claimant. They referred to *Taylor* v. *The Mayor of Montreal* (1).

Mr. *Matthews*, Q.C., replied.

1877 Dec. 10.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Their Lordships are called upon in this appeal to reverse two judgments of the Court of Queen's Bench at *Quebec* with reference to the amount of compensation to be paid by the Respondents, the corporation of the city of *Montreal*, to the Appellants, as proprietors of certain lands expropriated for the purpose of forming a park, to be called *Mount Royal Park*.

It appears that by an Act of the Colonial Legislature, 27 & 28 Vict. c. 60, the corporation were authorized to make very extensive improvements in the city of *Montreal*, and for that purpose to take lands compulsorily. By the preamble it was recited that the then existing law of expropriation led to great delays, and by sect. 13 a new mode of assessing compensation was provided.

By that section it was enacted that in case the corporation should not be able to come to an amicable arrangement with the persons interested in the ground or real property required to be taken, as to the price or compensation to be paid for the same, the Superior Court of *Lower Canada* for the district of *Montreal*, or a Judge thereof, should appoint three competent and disinterested persons as Commissioners to fix and determine the price or compensation to be allowed for such land or real property, and that the Court or Judge should fix the day on which the Commissioners should commence their operations, and also the day on which they should make their report.

By sub-sect. 5 of that section, the Commissioners, before proceeding, were to be duly sworn, and they were vested with the same powers and entrusted with the same duties as were conferred by the laws in force in *Lower Canada* upon experts in reference to appraisements, one of those duties being to view the property to be appraised.

(1) 18 Low. Can. Jur. 210.

By sub-sect. 7 it was enacted that it should be the duty of the Commissioners to diligently proceed to appraise and determine the amount of the price, indemnity, or compensation which they should deem reasonable, and they were thereby authorized and required to hear the parties and to examine and interrogate their witnesses, as well as the members of the council and the witnesses of the corporation; but it was declared that the said examination and interrogatories should be made *vivâ voce* and not in writing, and consequently should not form part of the report to be made by the said Commissioners. The section then provided that if, in the discharge of the duties devolving upon the Commissioners, there should occur a difference of opinion between them, the decision of two of the Commissioners should have the same force and effect as if all the said Commissioners had concurred therein.

Sub-sect. 12 was as follows:—"On the day fixed in and by the judgment appointing the said Commissioners, the corporation of the said city, by their attorney or counsel, shall submit to the said Superior Court, or to one of the Judges thereof respectively, the report containing the appraisement of the said Commissioners, for the purpose of being confirmed and homologated to all intents and purposes; and the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal."

That sub-section was afterwards amended by the 35 Vict. c. 32, s. 7, which contained, amongst other things, the following words:—

"Sub-sect. 12 of clause 13 of the Act 27 & 28 Vict. c. 60, is amended by adding at the end of the said clause the following words, to wit: 'for the purposes of the expropriation;' but in case of error upon the amount of the indemnity only on the part of the Commissioners, the party expropriated, his heirs and assigns, and the said corporation may proceed by direct action in the ordinary manner to obtain the augmentation or reduction of the indemnity, as the case may be, and the party expropriated shall institute such action within fifteen days after the homologation of the report of the said Commissioners, and if upon such action the Plaintiffs

J. C. 1877 MORRISON v. MAYOR, &c., OF MONTREAL.

succeed, the corporation shall deposit in Court the amount of the condemnation, to be paid to the party or parties entitled thereto."

By 32 Vict. c. 70 (*Quebec* Statutes), power was given to the Corporation to form a park, to be called *Mount Royal Park*, and by sect. 20 it was enacted that all the land required for the park should be deemed to be within the city, and that all the powers of expropriation possessed by the corporation of *Montreal* should extend to it. By sect. 22, however, an alteration was made as to the mode of appointing the Commissioners to value the property to be expropriated, and it was enacted that one should be appointed by the corporation, one by the party whose property should be expropriated, and the third by a Judge of the Superior Court.

Such being the state of the law, the corporation, on the 14th of March, 1873, gave notice of their intention to take an estate of which the Appellants were the owners, called the *Mount Tranquil* estate. The estate contained 3,543,104 superficial feet, equal to about 96 arpents and $\frac{2}{10}\frac{8}{0}$, and Commissioners were appointed to fix the price or compensation to be paid for the same. The Commissioners were *Alexander McGibbon*, Esq., on behalf of the corporation, *John McLennan*, Esq., appointed by the Appellants, and *Robert W. Sheppard*, Esq., appointed by a Judge of the Superior Court.

There may be a slight difference between a superficial foot in *Canada* and a superficial foot in *England;* but it will be sufficiently accurate for the purpose of this case to consider a superficial foot in *Canada* as equal to a superficial foot in *England;* and to treat the total quantity of land to be expropriated as amounting to about eighty-one English acres and a fraction.

On the 26th of June, 1873, the Commissioners made a unanimous report, by which they fixed $210,000 as the amount to be paid as compensation. On the 5th of July, 1873, the report was homologated and confirmed by the Honourable Mr. Justice *Torrance*, one of the Judges of the Superior Court, after due proof adduced of the observance of all the formalities and proceedings required by 27 & 28 Vict. c. 60, and 32 Vict. c. 70.

On the 18th of July, 1873, the Plaintiffs commenced an action against the Respondents in the Superior Court for *Lower Canada*,

alleging in their declaration that in awarding the sum of $210,000 the Commissioners had fallen into error upon the amount of indemnity, and that they ought to have awarded the sum of $539,920, which was the true value of the property for purposes of expropriation.

The Defendants, by their plea, denied that there was any error so far as the Plaintiffs were concerned or interested, and alleged that the sum of $210,000 was, and is, in excess of the real value of the property.

The case was tried in the Superior Court by the Honourable Mr. Justice *Johnson*, who awarded to the Plaintiffs the sum of $245,000, in addition to the amount of $210,000 previously paid under the award of the Commissioners. From that judgment the Defendants, the present Respondents, appealed to the Court of Queen's Bench for the province of *Quebec*, and the Plaintiffs, the present Appellants, presented a cross appeal, seeking to augment the sum awarded to them by the Superior Court by the sum of $429,920, making the total amount $100,000 in excess of the amount claimed by them in their action.

The appeal and cross-appeal were heard together, and on the 22nd of June, 1876, the Court of Queen's Bench reversed the judgment of the Superior Court, and dismissed the action of the Plaintiffs. The Honourable Mr. Justice *Monk*, and the Honourable Mr. Justice *Ramsay*, two of the Judges of the Court of Queen's Bench, dissented from the judgment of the majority of the Judges of that Court.

It was contended on behalf of the Respondents that, in order to maintain an action upon the ground of error on the part of the Commissioners in respect of the amount of the indemnity, it must be shewn that the award of the Commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the Court of Appeal in *Canada*, in the case of *Bagg* v. *Mayor of Montreal* (1), and also in the present case, one learned Judge only dissenting, that whenever it can be shewn that the Commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an

(1) 19 Low. Can. Jur. 136.

J. C. 1877 MORRISON v. MAYOR, &c., OF MONTREAL.

action to obtain an augmentation of the indemnity. Their Lordships are clearly of opinion that that is the proper construction of the statute. The construction contended for is wholly inconsistent with the 27 & 28 Vict. c. 60, s. 13, cl. 7, by which it was enacted that the examination of the witnesses should not form part of the report of the Commissioners, and also with the 7th section of the 35 Vict. c. 32, by which the party expropriated is authorized, in the case of error on the part of the Commissioners, to proceed "by direct action in the ordinary manner" to obtain an augmentation of the indemnity, which necessarily includes the right to adduce evidence in support of the action.

The substantial question to be determined in this appeal, therefore, is whether the evidence adduced in the action was sufficient to prove that there was error on the part of the Commissioners as regards the amount of the indemnity awarded by them. In determining that question their Lordships are of opinion that the prospective capabilities of the land ought to be taken into account and that for the purpose of this appeal it may be assumed that some enhancement of price ought to be made upon the ground of the proprietors being obliged to part with their land compulsorily.

It was urged that at the time when the Commissioners made their award it had been determined by the Superior Court that in valuing land for the purpose of expropriation, the prospective capabilities were not to be taken into consideration; and that although that decision was reversed on appeal to Her Majesty in Council, the appeal had not been decided at the time when the Commissioners made their report, and that it must be assumed that the Commissioners did not take into consideration the prospective capabilities.

The Commissioners in their report are silent as to their reasons; but their Lordships, having regard to the evidence adduced before the Commissioners and to the amount awarded by them, viz., $210,000, cannot suppose that the Commissioners excluded from their consideration the prospective capabilities, or the fact that the expropriation was compulsory. Calculating the dollar at 4s., the sum awarded was equal to £42,000, which for eighty-one acres was at the rate of nearly £520 an acre for the land, which at the time of the expropriation was producing but little, if any, profit.

The $245,000 awarded by the learned Judge in addition to the $210,000 awarded by the Commissioners, make a total of $455,000, which at 4s. a dollar is equal to £91,000, or upwards of £1120 an acre for each of the eighty-one acres, of which some of the witnesses stated that not more than one-half was fit for building purposes.

The learned Judge held very properly that the only question before him was one of fact, which must be determined by the evidence given in his presence.

The real issue, as it appears to their Lordships, was, Was there error on the part of the Commissioners in awarding only the sum of $210,000, and, if so, to what extent were the Plaintiffs entitled to an augmentation of it.

The report of the Commissioners, which under the former law would have been final, must, notwithstanding the alteration of the law, be considered correct until it is proved to be erroneous. The *onus* of proving error on the part of the Commissioners lay upon the Plaintiffs. The judgment of the Commissioners, as expressed in their report, was entitled to great weight. It was not in this case merely the judgment of a majority. The report was unanimous, and was one in which the Commissioner appointed by the Appellants themselves concurred. Their Lordships are of opinion that it ought not to be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill.

Treating the subject in that manner, the opinion of the Commissioners had no more weight attached to it than if they had made no report at all. In another part of his judgment the learned Judge remarked: "I have to judge according to the evidence. As I view the case, the law no more makes me judge of the value of real estate, apart from the sworn evidence before me, than it makes me judge of the value of pork, or flour, or any other thing of which the value is in question before me. In the one case, as in the other, I can only know what is proved. If

J. C. 1877

MORRISON v. MAYOR, &c., OF MONTREAL.

this evidence is untrue, it was the business of the Defendants to contradict it, which they have not done. If it is true, I have done no injustice in acting upon it."

The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the Commissioners. In their Lordships' opinion the learned Judge attached too much importance to the opinions of witnesses, which were chiefly of a speculative character; and they have to observe that the amount awarded by him exceeded the valuation of some of the claimants' own witnesses.

Their Lordships, therefore, concur with the majority of the Judges of the Court of Queen's Bench in the opinion that the judgment of the learned Judge of the Superior Court cannot be sustained. This being so, they are driven to the alternative of either affirming the judgments of the Court of Queen's Bench or of themselves fixing the amount of indemnity which ought to be paid. Notwithstanding the obvious inconvenience of the latter course, they would consider it their duty to adopt it if they saw clear proof that there had been a miscarriage of justice. But having listened with great attention to the arguments of the learned counsel for both parties, and having weighed with great care all the evidence in the cause, they have come to the conclusion that they would not be justified in declaring, against the opinion of the majority of the Judges of the Court of Queen's Bench, that there was error on the part of the Commissioners with regard to the amount of indemnity determined by them.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments of the Court of Queen's Bench, and to dismiss this appeal. The Appellants must pay the costs of the appeal.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondents: *Ashurst, Morris, Crisp, & Co.*

[PRIVY COUNCIL.]

IN THE MATTER OF A CAUSE IN THE SUPREME COURT OF CANADA, ENTITLED

JAMES JOHNSTON . . . . . APPELLANT;

AND

THE MINISTERS AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL } RESPONDENTS.

J. C.*
1877
Dec. 10.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Petition for Leave to appeal—Canadian Act, 38 Vict. c. 11, s. 47—Prerogative.

Although Her Majesty's prerogative to allow an appeal is preserved by Canadian Act, 38 Vict. c. 11, s. 47, their Lordships declined to advise its exercise in a case where the amount at issue was only $300, and where the issue between the parties related simply to the legal construction and effect of a particular contract, and where no general principle was involved, and no other cases were necessarily affected by the decision complained of.

THIS was a petition by the above-named Respondents, the minister and trustees of *St. Andrew's Church, Montreal*, for leave to appeal from a judgment of the Supreme Court of *Canada* (June 28, 1877) under the circumstances mentioned in the judgment printed below.

Dr. *Deane*, Q.C., and Mr. *Gibbs*, for the Petitioners, submitted that although under Canadian Act, 38 Vict. c. 11, s. 47, there was no appeal as of right from the judgment of the Court below, yet that they were not deprived thereby of an appeal should Her Majesty be pleased to grant them leave for that purpose by virtue of the Royal prerogative. Reference was made to *Cuvillier* v. *Aylwin* (1); *In re Louis Marois* (2); *Boswell* v. *Kilborn* (3). Assuming the Crown has a prerogative, they submitted that this

* *Present*:—THE LORD CHANCELLOR (Lord *Cairns*), SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 2 Knapp, 72. (2) 15 Moore, P. C. 189.
(3) 12 Moore, P. C. 467.

J. C. 1877

JOHNSTON v. MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL.

was a case for its exercise. The question raised was whether Respondents appointed under a statute had power to dispossess a pewholder of his pew at the end of his year. [THE LORD CHANCELLOR :—That is a question of construction of an existing contract. Future contracts can be remodelled. What is the importance of this case to justify special indulgence?] See statute and bye-laws, under which the trustees obtained rights which they contend they exercised rightly: 12 Vict. c. 154, s. 1, bye-laws made thereunder on March 11, 1851, 1, 2, 9, 10 and 12. There was a difference of opinion between the Courts below, and the case applies to all other pewholders under existing arrangements.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This is an application for the exercise by Her Majesty of her prerogative for the purpose of allowing an appeal to be brought from a judgment of the Supreme Court of *Canada*. The circumstances under which that judgment was given are these: A person of the name of *Johnston* commenced an action in 1873 in the Superior Court of the district of *Montreal* against the present Petitioners, who are the minister and the trustees of *St. Andrew's Church, Montreal*. The object of that action was to recover damages for what may be called a disturbance in the occupation of a pew in the church. The declaration stated that the Plaintiff was lessee of a pew in *St. Andrew's Church* for several years, and a pew-holder under a bye-law made by the trustees of the church. The bye-law referred to is the 10th, and it provided that "Any person who shall lease a pew from the trustees for one year and pay the rent in advance, shall be considered a pew-holder; the rents of pews and sittings are to be paid annually in advance from the first day of January, and are considered to be then due." The declaration then stated further, that he was the legal lessee of the pew No. 68 for and during the year from the 1st of January to the 31st of December, 1872, by verbal lease, and that on the 7th of December, 1872, he received a notice from the trustees that they declined to re-let the pew to him for the year commencing the 1st of January, 1873; that he did not receive sufficient legal

J. C.
1877
JOHNSTON
v.
MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL.

notice, and that he became the legal lessee of the pew for the year commencing the 1st of January, 1873, and ending the 31st of December, 1873, by the tacit renewal by law provided. Then he complained that the trustees had inflicted damage on his good name and reputation by removing his books from the pew, and his hassocks, and by placing strangers in the pew, and he claimed damages $10,000. On the other hand the present Petitioners, the trustees, by their pleas averred, in the first place, that the Plaintiff was not lessee of the pew No. 68 after the 31st of December, 1872, and that they had a right to refuse to lease it to him after that day; and, secondly, that according to the bye-laws, custom, and practice in the church, the pews were let each year and from year to year, and the trustees were under no obligation to continue the lease, nor was there any continuation thereof without their consent, nor was any notice required of the termination thereof. Then, that when the Plaintiff received the notice of the 7th of December, 1872, and frequently afterwards, he acknowledged the right of the trustees to refuse to let him the pew, and waived any pretensions to notice. Then, that the action of the trustees of the 7th of December, 1872, was ratified by the congregation at a general meeting at which the Plaintiff was present, and in the proceedings whereof he participated; and, finally, that all other acts and proceedings had been done in good faith.

That being the cause of action, and those the issues raised, the Supreme Court of the district of *Montreal* gave judgment dismissing the action, with costs; and thereupon there was an appeal by the Plaintiff *Johnston* to the Court of Queen's Bench for the Province of *Quebec*, the appeal side; and on the 3rd of February, 1876, the Court of Appeal gave judgment (there being a division of opinion, and a majority of three, and a minority of two), supporting the decision of the primary Court. There had thus been the opinions of two Courts taken. Then the Plaintiff in the action, *Johnston*, appealed to the Supreme Court of *Canada*, the Court of Appeal for the Dominion of *Canada*, established by the Colonial Act, 38 Vict. c. 11. That Supreme Court gave judgment on the 28th of June, 1877, and the judgment of the Supreme Court allowed the appeal, reversed the judgments of the Courts

J. C. 1877

JOHNSTON v. MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL.

below, and ordered the trustees to be condemned to pay to the Plaintiff *Johnston* the sum of $300 for damages, together with costs in all Courts.

It is with reference to that last judgment that the present petition is presented. The Petitioners assume that from it they would not have an appeal as a matter of right, but they ask to be allowed to have an appeal by the prerogative of Her Majesty.

The first question is, is there in this case a power, notwithstanding the Canadian Act, to allow, if Her Majesty should be so advised, such an appeal. Now I will read the section of the Canadian Act. It is the 47th section :—" The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of *Great Britain* and *Ireland*, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her royal prerogative." That section consists of three parts; the second or intermediate part of the section contains the negative words, " no appeal shall be brought," *et cetera.* Those words their Lordships may leave out of consideration, because they refer to what may be called the hypothetical establishment of a Court by the Parliament of *Great Britain* and *Ireland*, by which Court appeals from the colonies are supposed to be ordered to be heard; and inasmuch as no Court of that kind has been established, that part of the section may be omitted from our consideration. I will read it, therefore, as if the section ran thus, " The judgment of the Supreme Court shall in all cases be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her royal prerogative."

Now their Lordships have no doubt whatever that assuming, as the Petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section. Therefore their Lordships would have no hesitation, in a proper case, in advising Her Majesty to allow an appeal upon a judgment of this Court.

But the question remains, assuming that there is the power to

allow an appeal, is this a case in which the special prerogative of Her Majesty should be exercised?

Upon that point their Lordships have been unable to discover any adequate grounds for the special exercise of the prerogative. With regard to the particular amount at issue between the trustees on the one side, and the Plaintiff in the action on the other, that of course is the amount of damage which the trustees have been ordered to pay, namely, the sum of $300, a sum far short of the appealable value which has been defined in Canadian cases; and therefore if the particular value alone is looked to, there is not that amount of injury which would justify any special interposition of the prerogative.

Then, is there any general principle affecting a number of other cases established by the decision which should lead their Lordships to overlook the small amount of damage in the particular case?

As already pointed out, the issue between the parties appears to have been simply an issue upon the legal construction and effect of a particular contract, a contract for the occupation of the pew in question. So far as the declaration and the pleas are concerned, the question apparently raised between the parties was, both of them admitting that the tenure of the pew might properly be styled a lease, whether a pew-holder was entitled, under a certain clause in the Civil Code of *Canada*, to three months' notice to quit by reason of it having been a verbal lease. It is sufficient, with regard to a contest of that kind, to say that the decision of the Court below may either have been right or wrong. Their Lordships express no opinion whatever upon the point, but whether right or wrong it is not a decision which can have any bearing or which can occasion any inconvenience with respect to a large number of other cases. If there is any want of perspicuity in the terms under which the pews in this church at present are let, if there be any words in the byelaws of the trustees as to the letting of the pews which have caused a difference of opinion between the Judges of the Courts, all that can be most easily remedied, before any other annual letting of the pews, by an alteration of the words of the byelaws. And it appears to their Lordships that it would be a departure from the

J. C.
1877
JOHNSTON
v.
MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL.

principles which should guide them when advising Her Majesty as to when an appeal should be allowed, to advise that an appeal should be allowed merely for the purpose of testing the accuracy of the construction put upon a particular document, which document, if it affects any number of other cases, can be altered at the will of the party who asks for the exercise of the prerogative in allowing an appeal.

Their Lordships, therefore, cannot, either from the magnitude of the particular case, or from the effect which this decision may have upon a number of other cases, think that this is a case in which they should advise Her Majesty to allow the appeal which is asked for. They therefore must recommend Her Majesty not to assent to the prayer of this petition, but to dismiss it.

Solicitors for Petitioners: *Wilde, Berger, Moore, & Wilde.*

[HOUSE OF LORDS.]

EDWARD SMITH . . . . . APPELLANT;

AND

THE DIRECTORS, &c., OF THE GREAT WESTERN RAILWAY COMPANY . . } RESPONDENTS.

H. L. (E.)
1877
Nov. 9, 13.

*Mine—Unworked Minerals—Compensation—Injunction—Lease—Forfeiture—Surrender—*8 & 9 *Vict. c.* 20.

In claims for compensation for not working mines adjoining a railway and railway works, the 6th and 78th sections of the *Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 20), must be read together.

The 6th section gives a general right to compensation to "owners and occupiers of, and all other parties interested in, lands taken or injuriously affected by the construction" of the railway.

In the 78th section, the person entitled to give notice to the directors of a railway company of his intention, within thirty days, to work a mine is the "owner, lessee, or occupier," who has the right and the power to work it—the directors are entitled to have an inspection of the mine, and to offer compensation to him for not working, which compensation may be settled as therein mentioned. The compensation thus settled is that to which he is individually entitled, according to the extent of his interest. If the lessee is the person thus giving notice, and receiving compensation, the owner, if he can shew a right of his own beyond that of his lessee who has been compensated, is also entitled to compensation under the 6th section.

The words "he" and "his," in two of the parts of the 78th section refer to the person entitled to compensation, whether owner, lessee, or occupier.

The word "lands" in the 6th section includes mines; and that section, in regard to the compensation thereby provided, is to be read with reference to the *Lands Clauses Consolidation Act.*

After compensation agreed on, and obtained or tendered, a perpetual injunction may be granted against the working of the mines.

Where a lessor claimed as for forfeiture for breach of covenant to re-enter on mines demised, but a compromise was effected and the lease surrendered, the lessor was recognised as a reversioner; and his subsequent sale of the fee *held* to convey to his vendee all the rights of an original owner.

R. was the owner of lands with coal and ironstone under them. The surface of a portion of the lands (about 4½ acres), had already been conveyed to a railway company, and a railway and railway works had been constructed thereon. The mines had not been conveyed. *R.*, by a verbal agreement, afterwards converted into a lease, let into possession *H.*, who was to work the mines, and, under the name of an acreage royalty or rent, was to pay a sum of £150 an acre for each of the 4½ acres until the money paid reached an amount which was the calculated value of the minerals in that part of the mine. Had

H. L. (E.)
1877
SMITH
v.
GREAT WESTERN RAILWAY CO.

this lease been, in fact, duly followed, there was time enough for the tenant to work out all the minerals in the 4½ acres. It was not followed. *H.* gave notice (under the 78th section of the *Railways Clauses Consolidation Act*), to the railway directors of his intention to work the mine under the 4½ acres. The directors (though not within the time mentioned in the statute), gave a counter notice, obtained an inspection of the mine, and agreed with *H.* as to his compensation. In the agreement *H.* covenanted to pay the £150 royalty acreage, and to use his best endeavours to facilitate the settlement of his lessors' compensation. He did neither; he died insolvent, having received from the directors different portions of his compensation. His executors at first worked the mine, but were accused by the lessors of repeated breaches of covenant, and on a bill being filed against them, compromised the matter by surrendering the lease of the whole colliery, the 4½ acres being therein included. The minerals under the 4½ acres had not then been fully worked out. The lessors sold the fee of the whole mine to *S.* Both they and *S.* were ignorant of the dealings which had taken place between the directors and *H.* *S.* gave notice to the directors of his intention to work the mine under the 4½ acres, they gave a counter-notice, and offered to pay him such compensation as he might be found entitled to, having regard to that which had already been paid to *H.* *S.* refused to treat with them on that footing. They filed a bill to restrain him from working, and in the bill made the same qualified offer of compensation:—

Held, that, on these terms they were entitled to a perpetual injunction.

Held, also, that, as in their bill they had made this offer of compensation, they were entitled to the costs of the appeal.

THIS was an appeal against an order of the Court of Appeal reversing a decree of Vice-Chancellor *Hall*.

The Respondents had filed a bill against the Appellant to restrain him from working certain mines, containing coal and ironstone, of which he had become the purchaser from the trustees of a Mr. *Round*, the Respondents apprehending from such intended working, damage to their railway.

The portion of the railway and the works which were the subject of the suit lay within the parish of *Wednesbury*, in the county of *Stafford*, and extended from a distance of about 300 yards from the "*Wednesbury Brook*," on the south, to an intersection of the *South Staffordshire Railway* on the north. This particular portion of the railway and the land on either side of it contained about 4½ acres. It was constructed upon an embankment twenty feet above the general level of the surface ground, a part being carried over a viaduct, and eighty feet above the level of the ungotten coal, compensation for which was the subject of dispute. The surface of the land had originally been purchased under a

private Act of 1846, by the *Birmingham, Wolverhampton, and Dudley Railway Company* (now incorporated with the Respondents' company), and this private Act was declared to be incorporated with the Railway Acts of 1845. The conveyance of the land, dated in December, 1854, did not include the minerals.

In the year 1863, *William Hodgkins* was by *Round* let into possession of the colliery, including the mines under the railway, in virtue of a verbal agreement for a lease of the colliery and mines. The lease was in fact to be a purchase of the colliery, the purchase to be effected by the payment of an acreage royalty, or rent, which at the end of fifteen years was calculated to amount to the value of the minerals. That value was estimated at £10,939 17*s.*, and the royalty was fixed at £150 an acre for the mines under the railway, and £550 an acre for the rest. The mines under the railway had been before partially worked, but there still remained some thick ribs of coal and some ironstone which could be got.

On the 25th of May, 1864, *Hodgkins* gave notice to the Respondents (under the 78th section of the *Railways Clauses Consolidation Act*, 1845), of his intention to work the mines of coal and ironstone within forty yards of the railway and railway works, and this notice included the 4½ acres before mentioned. The Respondents excused themselves for not requiring, and making, at that moment, a survey of the mines, and the matter stood over for a time. A survey was afterwards made by their engineer, and on the 9th of December, 1864, the Respondents gave *Hodgkins* the statutory notice that his proposal to work under the 4½ acres would be likely to occasion damage to the railway works, and that they were willing to make compensation to him "and all other parties entitled thereto, whether as owners, lessees, or occupiers," such compensation to be settled under the Act.

Mr. *Round* died in July, 1864, and his estate became vested in executors and trustees, who on the 12th of April, 1865, granted to *Hodgkins* a lease in accordance with the verbal agreement made by their testator. The lease was to be taken as commencing in March, 1863, and was to be for fifteen years from that date.

On the 11th of May, 1865, *Hodgkins* gave the Respondents notice of a claim for £3635, out of which he was willing to pay to the lessors in respect of the coal left ungotten under the railway

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

such sum as by the terms of the lease the lessors would be entitled to claim in respect thereof.

On the 16th of March, 1866, an agreement in writing was made between *Hodgkins* and the Respondents, by which (among other things) it was arranged that they should pay him £688 (a sum calculated upon the purchase value of the minerals under the 4½ acres), as compensation for leaving ungotten the coal and ironstone measures there situated. The sum thus agreed to was to be retained and set off against other matters payable by him. And he agreed to enter into a covenant for the payment of the purchase-money or royalty of £150 an acre to his lessors, and, at the Respondents' expense, to facilitate the assessment of the lessor's compensation. On the execution of this agreement, he desisted from working the mines in question.

Neither the fact of the notices nor of the agreement founded on them was ever communicated to the trustees of *Round*.

Hodgkins, who had become insolvent, died in November, 1868, and his executors continued to work the colliery demised by the lease of April, 1865, omitting the coal and ironstone under the 4½ acres, and in May, 1849, a bill was filed against them by the trustees of *Round's* estate, for a forfeiture for breaches of covenant, but the trustees of *Round* accepted from the executors, by way of compromise, a surrender of his lease, and having thus become entitled to the freehold, entered into a contract with the Appellant for the sale to him of part of the real estate, including the pillars of thick coal which were the subject of this appeal, for the sum of £905 17*s.* 6*d.* The Appellant at the time of his purchase of the said estate had no notice of the agreement of the 16th of March, 1866, or of the notices by *Hodgkins* and by the railway directors which preceded it.

In October, 1873, the Appellant, being thus in possession as owner, gave notice, under the statute, to the Respondents of his intention to work the mines and minerals lying under the railway, unless they were willing to make him compensation in respect thereof. The Respondents did not acknowledge the Appellant's right to work them, and on the 15th of April, 1875 (after much correspondence on the subject) they filed their bill (which was afterwards amended) against the Appellant, and prayed that he might

be restrained from working "the ribs and pillars of thick coal in the bill mentioned, or any other minerals down to and inclusive of the new mine coal lying under the 4½ acres," &c., under or adjacent to the Respondents' railway and works, "so as to occasion any subsidence of the surface, &c. or damage," to the railway and works. And the bill prayed for an account of the coal and other minerals raised by the Appellant, or other persons, under the 4½ acres, and that the Appellant should be decreed to pay to the Plaintiffs (the Respondents) what should be found due on taking such account, and also damage for any injury. The Respondents alleged their willingness to pay, and they offered to pay the Appellant, compensation for such portion of the mines under the railway and works, as might be required for the maintenance thereof, having regard to the compensation already made to *Hodgkins* and his lessors, and alleged that the Appellant had refused to accept compensation on that footing.

An interim injunction was granted.

The cause came on for hearing before the Vice-Chancellor *Hall* on the 23rd of November, 1875, when the bill was ordered to be dismissed with costs; and an account was ordered as to what damages had been sustained by the Appellant.

The directors appealed against this decree, and on the 13th of January, 1876, it was reversed (1), and the following Order was made:—"That a perpetual injunction be awarded to restrain the Defendant *Edward Smith*, his servants, agents, and workmen, from excavating, mining, or working the ribs or pillars of thick coal in the Plaintiffs' bill mentioned, or any part thereof, or any other minerals down to and inclusive of the new mine coal lying under the 4A. 2R. 14P. of land, or any part thereof, in the Plaintiffs' bill mentioned. But this Order is to be without prejudice to the right of compensation (if any) of the executors and trustees of the will of *Benjamin Round*, deceased, or any person claiming under them, by reason of the notice given by the Plaintiffs, the *Great Western Railway Company*, to *William Hodgkins*, not to work the mines under the said land. And it is ordered that the Defendant *Edward Smith* do pay to the Plaintiffs, the *Great Western Railway Company*, their costs of this suit, including the

(1) 2 Ch. D. 235.

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

said decree, and consequent thereon, and also their costs of this appeal motion, and consequent thereon.

This appeal was then brought.

Mr. *Ince*, Q.C., and Mr. *Jolliffe* (Mr. *James Anstie* was with them), for the Appellant:—

It is clear that the Legislature intended to give effective protection to the owner of mines lying under lands taken by a railway company or adjoining to the railway: *The Great Western Railway Company* v. *Bennett* (1), where the sections of the statute now under consideration received an authoritative construction. The 77th section of the 8 & 9 Vict. c. 20 (the *Railways Clauses Consolidation Act*, 1845) declares that on a purchase of land by the company the mines under the land shall not pass unless expressly included in the conveyance. They were not conveyed here, and so did not pass. The 78th section empowers the "owner, lessee, or occupier" to give notice of his intention, at the expiration of thirty days, to work mines within a certain distance of the railway, and allows the railway directors, if they are willing to give him compensation, to give him notice not to work the same; and the 79th section provides that if before the expiration of such thirty days the directors do not state their willingness to treat for the compensation to be given, it shall be lawful for him to work the mines in the usual and ordinary manner. In all these sections the person to be compensated, "the owner, lessee, or occupier," is spoken of as "he" and "his"; the phrase is in the disjunctive, and it is plain that each one is to be allowed a compensation for any injury to his rights, whatever they may be. Their rights may be several and distinct; and the Legislature never could have intended to give compensation to one and to leave the other utterly uncompensated. The giving compensation to the lessee can be no bar to the claim of the reversioner. The arrangement made in this case with *Hodgkins* did not affect *Round* or his trustees, and consequently did not affect a *bonâ fide* purchaser of their estate, the more especially as, in making that arrangement, the Respondents had not pursued the course described in the statute by giving their counter-notice within thirty days after receiving *Hodgkins'* notice, so

(1) Law Rep. 2 H. L. 27.

that they could not claim for what was then done, the protection of the statute. Even if compensation had been agreed on as between the directors and *Hodgkins*, there was no proof that it had been paid. The claims of the lessor had, therefore, been disregarded. *Hodgkins* undertook to pay the acreage royalty; the undertaking was itself an admission of the lessor's title to compensation, an admission which affected alike *Hodgkins* and the Respondents, being made in a deed to which they were both parties. If that acreage royalty had been paid to *Hodgkins*, of which there was no proof, it had not been paid to the lessor, whose property had thus been taken without compensation. Under these circumstances, the right of the lessor still existed as before, and nothing which had passed between *Hodgkins* and the Respondents could affect that right: *Martin* v. *The London, Chatham, and Dover Railway Company* (1). The right to get the coal might be in *Hodgkins*, but that right was subject to a royalty to be paid to his lessors, who therefore had a substantial interest in the produce of the mines. That interest had never been compensated, so that the argument of the Respondents really amounted to this, that having dealt with a third person for his interest, which after all was only a temporary interest, they were released from considering the interests of any one else. That was clearly not the intention of the statute, which, protecting the railway and works from danger, contemplated that those whose property was thereby injuriously affected should receive fair compensation. The *Midland Railway Company* v. *Checkley* (2) clearly established that in such Acts the Legislature intended to protect existing interests, and that if directors relied upon the Act, they must strictly pursue the provisions under which they claimed to enjoy any advantages. That had not been done here.

Mr. *Davey*, Q.C., and Mr. *S. C. Bowen* (Mr. *H. A. Giffard* was with them), for the Respondents:—

The Respondents had done all that was in their power to satisfy the requirements of the statute, and ought now to receive the protection they claimed. They had not any power to compel the owners of the land to come in and discuss the question of com-

(1) Law Rep. 1 Ch. Ap. 501. (2) Law Rep. 4 Eq. 19.

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

pensation. They could only deal with the person who gave them notice of his intention to work the mines, and if he had the right to work them, and gave the notice required by the statute, the directors were bound to give him a counter-notice, and with him to enter on the question of compensation. This they had done; and the amount of compensation to the person entitled to work the mine had been agreed upon. A part of that consisted of the payment of royalty to the owner, who perhaps had the power to call on them to satisfy any claims he might possess, but whom they had no power whatever to bring to any arrangement. The Respondents could not be called on from time to time by successive owners and successive occupiers to make compensation. The compensation being once made, the business was at an end. They might otherwise have to pay the full value of the minerals over and over again to successive owners and the successive lessees under those owners.

There really was no pretence for this appeal, for the order of the Court below, while granting the Respondents a perpetual injunction, had at the same time (really adopting in that way the offer made in the bill itself) declared that such order was without prejudice to the owner's right to claim compensation. It might be doubted whether under the circumstances here, he had any. The owner, at the time of the arrangement with *Hodgkins*, was the lessor of that person; the lease, the term of which had not expired, had not been forfeited, but surrendered, and the Appellant therefore here stood in the place of the lessee. He has not yet shewn that, under the circumstances of this case, he is entitled to anything more than his lessee would be entitled to if now alive to make his claim. [LORD PENZANCE:—The words are, "owner, lessee, or occupier," would not the first word include the reversioner?] Those words must be taken with reference to the other words, which are "the person entitled to work the coal." That person was at the time *Hodgkins*, and no one else, and he might have worked out the coal and left nothing whatever in respect of which the owner could claim any compensation. The persons mentioned in the Act are mentioned independently of each other, and the only person who was, in words, entitled, was he who had the power to work the coal. For he might work out the whole, and if he did,

having lawfully the right to do so, there could be no one, even if claiming, as on a forfeiture, the reversion of the land itself, who could have the right to claim compensation for coal which had already been lawfully worked out by another person. Here the persons under whom *Round* claimed came in as mere surrenderees of an unexpired lease, and therefore stood in the same position as the lessee himself, and with no superior rights: *Doe* v. *Pyke* (1). [LORD PENZANCE:—But if the tenant did not work out all the coal during his lease, would not the reversioner be entitled to compensation in respect of the coal left, to which he would clearly be entitled, but which, by a perpetual injunction, he is for ever prevented from getting?] This case is not like that of the owner of a house or of a farm, to be used only during a term, but to go back to the owner in its original form at the end of the term. Here there was a real sale of the coal itself, though the payment for the coal assumed the form of an acreage royalty payable in annual portions.

The case of the *Great Western Railway Company* v. *Bennett* (2) had no application here, for no question existed in that case as to the parties to the litigation and their rights; the only question really was, what was the amount to which the company could claim adjacent and subjacent support, which was to be determined by the special Acts of Parliament affecting the case. *Chamberlain* v. *The West of London Railway Company* (3), *Ricket* v. *The Metropolitan Railway Company* (4), and *The Metropolitan Board of Works* v. *McCarthy* (5), were also cited.

Mr. *Ince*, in reply:—

It might be that the lessee had the power during the existence of his lease, and on performing the covenants in it (one of which was paying the royalty on the coal actually taken), to work out the whole of the coal; but then he must pay the acreage royalty on it, and then, of course, there might be no claim for compensation on the ungotten coal; but if the tenant did not get the coal, and did not pay the royalty due on the getting of it, the

(1) 5 Maule & S. 146; see *Piggott* v. *Stratton*, 1 D. F. & J. 33.
(2) Law Rep. 2 H. L. 27.
(3) 2 Best & S. 605–617.
(4) Law Rep. 2 H. L. 175.
(5) Law Rep. 7 H. L. 243.

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

reversioner had a substantial unsatisfied interest in the coal, and, if he was to be for ever prevented from getting it, he was entitled to compensation, and it made no difference whether he was in possession of the reversion as a surrenderee of a lease, or upon eviction, for a forfeiture of it. A tenant was not the only person to be compensated; he might be only a tenant for a month, he might be wholly insolvent, he might make with the directors any arrangement that would suit his own purpose, and then it would be said that he, being at the time the person entitled to work the coal, no one else was to be entitled to compensation. The Legislature never intended to occasion such an injustice. In settling the compensation secured by the statute, the rights, not of one person only, but of all who had real substantial rights must be considered.

1877 *Nov.* 13.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the appeal in this case raises a question upon the construction of certain sections of the *Railways Clauses Consolidation Act*, a question no doubt of some novelty and of some difficulty. For the purpose of placing before your Lordships very shortly the exact question which you have to determine, a very brief narrative of the facts of the case will be sufficient.

The Plaintiffs in the Court below represent the *Great Western Railway Company*, succeeding for the purpose of this suit to the rights of another railway company. The Defendant in the Court below, the Appellant here, is a Mr. *Smith*, who is the owner in fee simple of certain mineral property under, and adjacent to, a portion of the line of the *Great Western Railway* near *Birmingham*, having succeeded by purchase to the rights of a former owner. While that former owner was the proprietor of this mineral property, he made a lease of it to a person of the name of *Hodgkins*, and in that lease was included the coal under a particular portion of the land in question, which I will term the 4½ acres, immediately under the railway. Many other portions of mineral property were included in that lease, and a payment which is called rent was reserved in respect of the various portions of mineral property demised. The lease was for fifteen years, and the rent was to

continue to be paid for the whole of the mineral property so demised until a sum of upwards of £10,000 should be paid to the lessor. Now this sum of £10,000 and upwards is stated on the face of the lease to be a sum which represented the total value of all the minerals included in the lease, taking the value of the different minerals at so much an acre, some at £500 an acre, some at £150 an acre. The 4½ acres to which I have referred were only part of a larger portion of mineral property included in the 3rd schedule to the lease, (amounting to about seventeen acres altogether,) and the value of the coal in this small portion was stated to be £150 an acre. In the lease there was contained a covenant of the usual kind that the lessee would do his best to work out all the minerals and mines. Therefore your Lordships have it that an agreement, called a lease, is made by an owner in fee simple with a tenant, ranging over the space of fifteen years, during which it was intended that the tenant should work out the coal under the 4½ acres, and should pay for that coal, out and out, to the lessor a sum of £150 an acre.

My Lords, that was the state of things under which Mr. *Hodgkins*, the lessee, was in possession. He had not at the time I am now going to refer to, worked the 4½ acres, but being prepared to work them, he gave a notice, under the *Railways Clauses Consolidation Act*, to the *Great Western Railway* directors of his intention to work. Your Lordships have had so frequently before you the sections of the *Railways Clauses Consolidation Act* upon this subject that I need only refer to them shortly. It is provided by those sections that a railway company is not to be entitled to the mines under land which it purchases; those mines are to be treated as excepted out of the conveyance to the railway company unless they are specifically and expressly included. The railway company, therefore, has this advantage: it may proceed to deal with the owners of land for the surface of their lands, and is not obliged to make to them what might be the very large compensation necessary if required to purchase, in the first instance, not merely the surface but also the mines down to the centre of the earth. But then the sections contemplate the possibility that the owner in whose possession the mines are thus left, or the lessee, or the occupier, may desire to work the mines, and the Act provides that,

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

if he does so desire, he is to give a certain length of notice to the railway directors of his intention to work them.

Then the 78th section, upon which the present question arises, provides that if the "owner, lessee, or occupier" of any mines lying under the railway, be desirous of working them, the owner, lessee, or occupier shall give to the directors notice thirty days before commencing working, and on the receipt of notice it shall be lawful for the directors to cause the mines to be inspected, and if it appear to them "that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines, or any part thereof, to such owner, lessee, or occupier thereof, then he shall not work or get the same, and if the company and such owner, lessee, or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Mr. *Hodgkins* gave the notice, and the directors of the company did settle with him; they agreed as to what his compensation should be, and the terms of the agreement between them and *Hodgkins* are in evidence before your Lordships. They are in substance these. The directors made another demise to *Hodgkins* of about 11½ acres, and then, as part of the whole arrangement, agreed to pay him £688 2*s.* 6*d.* (which we are told is exactly, according to the lease, the acreable value of the 4½ acres), "as compensation for leaving ungotten all the coal and ironstone measures down to and through the new mine coal inclusive (being all that are comprised in his lease from Mr. *Round's* trustees.)" That sum was to be retained and set off against the rents which might become due from Mr. *Hodgkins* to the company in respect of the other demise. Then the agreement continues: "Mr. *Hodgkins* to enter into a covenant for the payment of the purchase-money or royalty of £50" (it is agreed this is an error for £150) "per acre to his lessors, and, at the company's expense, to facilitate by any means in his power the assessment of the lessors' compensation for leaving the said coal measures permanently ungotten." Therefore, whatever the result may be in law, it is quite clear, that, in fact, the bargain made with *Hodgkins*, was a bargain with him alone, professing to be with him alone,

and only for his interest, taking notice of the annual payment he was bound to make to his lessors, and providing that he should do all that he could to facilitate a subsequent arrangement between the company and the owners of the reversion, for any interest the latter might have.

My Lords, what followed afterwards was in substance this: Mr. *Hodgkins* became embarrassed in his circumstances, and he was unable to make to the predecessors of Mr. *Smith* (*Round's* trustees), the payments he was bound to make under the first lease which I mentioned. He died. A bill was filed against his executors, and the bill resulted in a compromise by which they were in substance released from his obligations under that lease. *Round's* trustees took a surrender of it, and certain payments were made to one side or the other, to which I need not more specifically refer. In this way *Round's* trustees got rid of the lease to *Hodgkins*, and became, as it were, owners again, freed from the lease, of the mineral property. In the meantime, the working of the 4½ acres of coal had been stopped, in consequence of the agreement between the railway company and *Hodgkins*. The 4½ acres of coal had continued in this position, and remained unworked for several years, and the period at which the fifteen years, originally granted by demise to *Hodgkins*, would have expired, was approaching. *Round's* trustees having sold to Mr. *Smith*, he served upon the directors of the railway company a notice stating his intention, as the now owner of the property, to work the minerals in question; and thereupon they filed the present bill to restrain him from working these minerals, and the argument on the one side and upon the other, of which your Lordships have now to judge, is this:—On the part of the directors it is contended that that which they have done in regard to *Hodgkins*, the arrangement they made with him, gave to them a right to say that the working of these 4½ acres of land was stopped by the statute, and if any injury to any person other than *Hodgkins* has been occasioned, they, the Respondents, say that Parliament provides a mode of compensation for that other person. On the other hand the Appellant, Mr. *Smith*, contends that the Respondents have dealt with *Hodgkins*, and with him alone; have compensated him, and him alone; that any right to stop the working of the mine enured

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

to the railway directors as against *Hodgkins* only, that he the Appellant, Mr. *Smith*, is perfectly free from all that took place with *Hodgkins*, and that until he is compensated as the now absolute owner of the property he is entitled to work the mines as against the Respondents. The Vice-Chancellor was of opinion that the contention of Mr. *Smith* was right, and he dismissed the bill of the railway company. The Judges of the Court of Appeal unanimously held that that decree ought to be reversed, and have granted to the railway company a perpetual injunction against the working of the mines.

My Lords, the whole question turns upon the construction of the 78th section of the statute. It is perfectly clear that what is contemplated by the Legislature under the section is, that some person who, at the time of giving the notice which it contemplates, is entitled to work the mines, is the person who is entitled to give the notice. If he is the lessee the section provides that to him, as lessee, the railway directors are to give a counter-notice, or to inform him in some way that they are willing to make compensation for such mines. Then come the words of the section which have occasioned the difficulty in the case: they are the words which say that, "if the company be willing to make compensation for such mines, or any part thereof, to such owner, lessee, or occupier thereof, then he shall not work or get the same." The word "he" used here, refers evidently to the owner, or lessee, or occupier, who has given the notice, and to no other person.

My Lords, if the section has no other effect than to restrain from working a lessee who has a right to work, and who has given notice that he intends to work, the consequence would of course be this: a lessee might give notice to directors that he intended to work the minerals, the directors might inform that lessee that they were willing to make compensation, and did not wish the mines to be worked, they might settle with him the compensation, and, settling with him, of course they could only settle the compensation to which he individually was entitled. They might then, in a case where the lessee had the right to work and carry away the minerals, and to exhaust the mine, be bound to pay to the lessee the whole value of the minerals. The lease might come to an end, and if the argument of the Appellant is right, a

new lessee might be created, the reversioner might make a new demise, for the coal would be left, in consequence of the operation of this section, ungotten. The new lessee might, in turn, give a fresh notice, and the railway directors might have to compensate him again for the value of the whole of the coal so left ungotten, and this process might be repeated year after year, or lease after lease, and the company might have to pay several times over for the same coal.

My Lords, that of course is a construction which it is scarcely possible to believe could have been intended, and your Lordships would not arrive at it unless you were compelled to do so by the clearest words.

On the other hand there is an obvious difficulty in the opposite view of the case. If you are to hold that it is provided that a dealing between railway directors and a lessee is to debar or cut away the rights of the reversioner, you may do very great injustice to the reversioner. Your Lordships, therefore, would naturally desire to adopt a construction of the section which would avoid either of the two difficulties, the injustice on the one hand of repeated compensations to be made on the part of the railway company, the injustice on the other hand of depriving the reversioner, the owner of the property, of any right to which he might be justly entitled. My Lords, I am of opinion that the section may be construed, taking it in connection with the other sections of the statute, in a way in which neither of these injustices shall be occasioned.

It appears to me that what is intended by the Legislature with regard to mines under a railway is this: the railway company is to be under no obligation to compensate any person until there is some one who has a right to work, and who is prepared to work, the mines. When that person gives the notice of his intention to work the mines, the directors are to come to an agreement or settlement with that person, and to come to a settlement with that person according to what his rights may be; if the rights of that person are to take away the coal, to exhaust it entirely, and if he has a tenure the length of which will enable him to take away the coal and to exhaust it entirely, the railway directors may be bound, and, I should think, would be bound, to compensate that

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

person to an extent equal to the whole value of the minerals. If his right is not so great; if he cannot take away the whole, or if the extent of his tenure is not such as would enable him to take away the whole, the directors would have to compensate him to an extent less than the value of the whole.

Then, as it seems to me, the statute makes, in the 6th section, another provision which is to be read along with this 78th section as to the lessee, and which, as I really think, entirely protects the right of the reversioner. That section provides that "the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used." Of course "lands" include mines, and I read this therefore as a general provision that all other persons interested in the mines shall be compensated for the amount of their interests therein. The same section provides that "except where otherwise provided by this or the special Act the amount of such compensation shall be ascertained and determined in the manner provided by the said *Lands Clauses Consolidation Act* for determining questions of compensation with regard to lands purchased or taken under the provisions thereof." We all know what the provisions in the *Lands Clauses Consolidation Act* are, for determining by agreement, or before justices, or by arbitration, or by a jury, any question of disputed compensation.

19 Ch D 585.

Now, let me ask your Lordships to read into the 78th section, in the way I have suggested, the provisions of the 6th section, I think by so doing your Lordships will at once avoid any difficulty as to the construction of the words I have particularly referred to, namely, "he shall not get or work the same." My Lords, I read the two sections thus—I will begin with the 78th section, "If it shall appear to the directors that the working of the mines or minerals is likely to damage the works of the railway, and if they be willing to make compensation for such mines, or any part thereof," to such lessee, then "he" (the lessee) "shall not work or get the same." Then I read the 6th section thus: "And the directors shall make, to all those persons interested in the mines used for the purposes of the railway, compensation for the value of

their interests in those mines, and that compensation shall be settled in the way provided by the *Lands Clauses Consolidation Act.*" My Lords, it is quite true that reading the two sections in this way there are not, in what I have read, any words of negation prohibiting the persons having the ulterior interest from ever working the mine. But it seems to me that those words are entirely unnecessary. We have a provision that the lessee shall be dealt with and compensated, and that he shall not work. We have then a provision that all other persons shall be compensated according to their interests, and the inevitable conclusion from that is, that those other persons who are so compensated, or who may be so compensated, shall not work any more than the lessee might work. It would be a matter of astonishment if any Court of Equity could hesitate, if that be the construction of the Act, in prohibiting those other persons who either are to be, or may be, thus compensated, from working, just as they would prohibit the lessee himself.

My Lords, that appears to me to be the solution of the whole of this case—Mr. *Smith* may be able to shew that over and above the interest which the lessee had in these mines, an interest which would enable him, the lessee, to work and take away the whole of the coal, there was some farther, some ulterior interest which he, Mr. *Smith*, was entitled to, and in respect of which he may receive compensation; and if he is able to shew that, he may support a claim for compensation under the 6th section, and the decree of the Court of Appeal entirely preserves that right to him.

But, my Lords, there is a farther circumstance which has to be referred to in the case. In substance, the decree appealed against appears to me to be correct, but there is the question of the payment which was to be made, according to the lease, by the lessee for each acre of this mineral property. It is quite true that that lease has been surrendered to the lessor, but before the surrender there occurred the dealing with the lessee upon which the directors now rely, and upon which they claim their right to an injunction. Now, unquestionably, that dealing not only was consistent with, but actually contemplated, the payment of the acreage value, the value of £150 an acre of the mineral property to the lessor. My Lords, if this matter had to be decided

H. L. (E.) 1877 — SMITH v. GREAT WESTERN RAILWAY CO.

adversely to the company, I should have felt very great difficulty in thinking that the directors were entitled to the injunction, which they ask in their bill, without making a provision on their part for that which the tenant, the lessee, ought to have provided, namely, the payment of the £150 an acre. But fortunately the directors have relieved me, and have relieved your Lordships, from any difficulty as to deciding that question adversely to them. Not merely now, for the first time, at the Bar, but in their bill they made an offer which appears to me to be founded on good sense and equity, an offer to pay to Mr. *Smith* the acreage value of this coal, if it had not been already paid to him by the lessee; and they have said at the Bar, that they are content to take it that no payment was made by the lessee; and to pay the acreage value for the whole 4½ acres and upwards. My Lords, I am very glad that they have made that offer and made it originally by their bill, because incorporating that offer, as I shall propose to your Lordships to do, into your decree, it will not, as it seems to me, and ought not, to make any difference as to the costs of this appeal. It is not an offer now made by the directors to protect themselves from a difficulty arising in the course of the appeal, it is an offer which was made by them *ab initio*. My Lords, I shall therefore propose to your Lordships to confirm the Order of the Court of Appeal with only such a variation as would incorporate into it a provision as to the payment of the sum to which I have referred.

My Lords, there is another minor question which has been raised as to the form of the decree. It is said that it has gone too far, and that it restrains Mr. *Smith* from working not merely the coal, but any ironstone under the lands, and that the ironstone was not the subject of the lease to *Hodgkins*, and therefore could not be the subject of the negotiations with or purchase from *Hodgkins*. There is no doubt that when Mr. *Smith* gave his notice to the directors of his intention to work, he stated to them that he intended to work both coal and ironstone, and if that notice was to be held a good notice entitling him to work as to the ironstone, the time has passed for the railway directors to give a counter notice, and he would be entitled, whether they were willing to compensate him or not, now to work the ironstone. My Lords,

the injunction of the Court of Appeal restrains him, as I have said, from working either coal or ironstone, and, subject to one modification, I am of opinion that that injunction is right. I think, my Lords, that until Mr. *Smith* gives a notice disembarrassed of any question as to the coal, and confined merely to ironstone (if he is entitled to work any), he ought not to be allowed to put in force the machinery of the *Railways Clauses Consolidation Act.*

My Lords, I propose therefore to move your Lordships to vary the decree appealed from upon those matters which I have mentioned; and the decree would then run in the way in which I am about to read: "The Plaintiffs being ready and willing, and hereby offering to pay to the Defendant the sum of £——" (that would be a sum of between £600 and £700—the parties will have no difficulty in arranging the exact figure), that is to say, the acrerage value stipulated for in the lease of the 12th of April, 1865, in respect of the coal hereinafter mentioned, the Court doth order that the Plaintiffs pay such sum to the Defendant on or before the 1st day of December next; and the Court doth order that a perpetual injunction be awarded to restrain the Defendant *Edward Smith,* his servants, agents, and workmen, from excavating, mining, or working the ribs or pillars of thick coal in the Plaintiff's bill mentioned, or any part thereof, or, until he shall have given a notice under the 78th section of the *Railways Clauses Consolidation Act,* any other minerals under the 4A. 2R. 14P. of land, or any part thereof in the Plaintiffs' bill mentioned. But this order is to be without prejudice to such right of compensation, or of farther compensation (if any) of *Daniel George Round, Benjamin Whitehouse,* and *Frederick William Seaman,* the executors and trustees of the will of *Benjamin Round,* deceased, or any person claiming under them, by reason of the notice given by the Plaintiffs, the *Great Western Railway Company,* to *William Hodgkins,* not to work the mines under the said land as they may be entitled to." Then, my Lords, the remainder of the decree will stand with regard to the costs below; and, for the reasons I have submitted to your Lordships, I think these variations should not make any difference as to the costs of this appeal, but that the Appellant should pay to the Respondents the costs of the appeal.

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

LORD PENZANCE:—

My Lords, I do not propose to trouble your Lordships at any length upon this case, the argument of which has been most able and exhaustive. After the statement which we have just heard from my noble and learned friend, nothing remains to be said as to the facts of the case, and the few observations that I have to address to the House will be confined to the question of what was the intention of the Legislature in enacting the group of sections which commence at section 78.

The two alternative constructions which are presented to the House for consideration are these: on the one side it is said that the meaning of these sections is that where a person, either as owner, or as lessee, or occupier of mines, desires to work the mines under a railway, he shall give notice to the railway company of that desire, and that the railway company shall then ascertain whether the safety of the railway will be compromised by his doing so; and if the directors are satisfied that it would not do for the safety of the railway to permit the working, then they shall come to an agreement with the person giving the notice, and that thereupon the coal shall not be worked. That is to say, that notice having been once for all given, and full and proper compensation having been once arranged between the directors and the person entitled to work and take the coal away, the coal shall for ever remain where it is, and shall not be worked. That, I say, is one alternative meaning proposed as the proper construction of these sections.

The other meaning proposed is, that this arrangement was intended only to be of a temporary nature, that it was intended to be an arrangement which began and ended with the interest of the person who gave the notice, whether he was owner, lessee, or occupier; that the scope and intention of the section was merely to provide that the directors should deal with this individual for his interest and for his interest only, and upon their having dealt with the individual upon his interest, that individual, and that individual only, should be prevented from working the coal. The obvious, the inevitable, the unquestionable result of that mode of reading the statute has been pointed out over and over again, and I have heard no answer suggested to what I may call the

monstrous injustice, that such an interpretation would bring about, because undoubtedly if the arrangement begins and ends with the individual who gives that notice he is, or may be, only a lessee, his term may expire in a year, then another lease may be granted, and if so the directors will have to arrange with that second lessee. In like manner a third lease may be granted, and they will have to arrange with that third lessee, and so on *ad infinitum*. And there is this farther to be observed, that the directors are not only to arrange with the lessee, but, if he is a person who is entitled to take all the coal, the compensation for preventing him from taking the coal, must be the full value of the coal left. While it is argued as if the directors were compensating one who had only a partial interest, the truth is, that the compensation must be given as to one who had the whole interest. The full value of the coal, and nothing less than the full value of the coal, deducting, of course, the cost of getting it, must be the measure of the compensation which would be due to this lessee. So that the directors, upon that assumed interpretation, would have to provide over and over again the full value of the coal to each successive person who could come forward and say, "I am entitled to work this coal, and I propose to do so." My Lords, that appears to me so very extravagant a proposition as to the meaning of the Legislature, that unless we were pressed into it by considerations which really were not capable of being met upon any of those grounds upon which Courts of Justice are in the habit of acting, I should be unable to accede to it.

Now, the form in which the objection arises is, that the section which prohibits the owner or lessee from working, uses the words "he shall not work" the coal. Those who insist upon the interpretation which I have just been criticising, insist upon the literal interpretation of that section, and they say: This cannot be a permanent arrangement, because the section says "he," and the only person before spoken of being the person who gives the notice, it means that he shall not work the coal, and goes no farther. My Lords, for the reason I have just given, I feel no difficulty myself in saying that that word "he" must be construed as including something more than that one individual, because, where an injustice of the character which I have just been describing would

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

be worked by construing it strictly, it would be, I think, entirely within the practice of the Courts to adopt a more liberal construction. Therefore I do not myself feel bound by the mere literal use of the word "he" to arrive at the conclusion which we are asked to adopt.

But now, my Lords, I invite the attention of the House for a moment, in considering these alternative interpretations, to the other clauses which follow the 78th section. Section 79 I need not trouble your Lordships with; but sect. 80 says that "If the working of" a mine under a "railway or works" "be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, and occupiers of such" mine "to cut and make such and so many airways, headways, gateways, or water levels, through the mine, measures, or strata the working whereof shall be so prevented, as may be requisite to enable them to" work their mine. Surely that points to a more permanent stopping of the mine than would be involved in merely preventing a lessee for a year, or for six months, from taking away the coal; for a permanent provision is made to prevent possible injury being done to other mines; permanent ways are to be cut through to allow those other mines to be worked.

Sect. 81 says, in like manner, "The company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier, by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway." All these provisions again point, as it seems to me, to the mine being permanently prevented from being worked.

That being so, we cannot but ask what is the objection that is made to the more general and more liberal interpretation of the section: I mean the interpretation which would make the arrangement one of a permanent character. The first objection that is

made is this.—I will not deal now with this particular case, but with a case which might arise.—It is said: You have got a lessee who is entitled to work, but he is to pay a royalty of, say 10*d.* a ton, or whatever it may be, on the quantity of coal that is brought to bank. You have obviously there a person, the lessor, who has an interest in this coal being worked, because he will lose his 10*d.* a ton if the coal is not worked. It is obvious that in that case there is an interest in a third person beyond the interest of the person who is about to work the mine. If there had been no provision in this statute for the compensation of the third person so situated, I could understand that that would be a strong argument for adopting a different construction of the 78th section. But, my Lords, it turns out on examining the statute that there is that section 6, which is intended to give compensation, according to well-known principles, to everybody whose lands are either used or injuriously affected by the construction of the railway and the exercise of the powers of this Act. It seems to me that that section does away with that difficulty. If there is an owner who is entitled to royalties which he does not get by reason of what happens under this 78th section, he may at once come in and obtain compensation under sect. 6. Many other cases may be put which I need not trouble the House with. Sect. 6 is wide enough to enable anybody, who has an interest in the land, to come in and claim compensation, if that interest is injuriously affected by the construction of the railway.

Then, my Lords, I come to the consideration of the circumstances of this particular case. I have had the greatest difficulty in seeing, from the beginning to the end of this case, how (I take it on the supposition in the first instance that the rent was paid) the lessor could have any interest in the question whatever. The lessor ascertained what the value of the coal was, and entered into an agreement by which he handed over to the lessee the right to take the whole of the coal. He granted him a lease which was so calculated in point of time as to enable him to take the whole of the coal, and he took a rent which represented the whole value of the coal, and supposing that rent had been paid to him, it passes my comprehension to see what possible interest the lessor had remaining. He had got the value of his coal, the whole

J. C. 1877 SMITH v. GREAT WESTERN RAILWAY CO.

value of his coal had been paid in the shape of rent, and it would be absolutely immaterial to him whether the tenant had taken out the coal, and sold it, or whether the tenant had, under the 78th section of this Act, been obliged to leave the coal there, and received the value of it as compensation from the railway company. The position of the lessor in either the one event or the other would have been precisely the same. Therefore I really do not see what interest remained in the lessor.

But it seems that a sum of £600 odd has been offered by the directors to be paid to Mr. *Smith*, the present Appellant, who represents the lessor, which sum is a sum equivalent to the rent which Mr. *Hodgkins* ought to have paid, but did not pay. They have made that offer, and it seems to me that it is a very liberal offer on their part. The position of the lessor under these arrangements was this—his tenant, according to the assumption, although I do not think that that is in any way clearly made out, had not paid his rent. I say it is not clearly made out, because he did pay £4000 odd, and it is exceedingly difficult to ascertain whether that would be attributable at all, or in what proportion, to this particular portion of the property that lies under the railway. However, assuming for the moment that he had not paid the rent, then it is said that his lessor would have a right to come upon the directors to pay that unpaid rent in the form of compensation. Now, my Lords, I have the greatest possible difficulty in appreciating that. If it is true, then this follows: The directors, in justice and equity, were bound to pay for the same thing twice over, because undoubtedly they paid Mr. *Hodgkins* for the value of the coal, and no doubt they were bound to pay him the value of the coal, for he had a fifteen years' lease, he had the right to take it, the power to take it, and the time in which to take it, and when they said, You shall not take it;—the compensation to *Hodgkins* could have been nothing less, and was nothing less, than the value of the coal. Well, then, if after having paid him the value of the coal, they were bound to pay £600 besides to the lessor, they would be paying for the same thing twice over. To my mind that single observation is sufficient to shew that the lessor can have no right to make a claim against the railway company for the unpaid rent of Mr. *Hodgkins*, whether in the form of unpaid rent,

or in the form of compensation. The fact is, the lessor made over the coal substantially to *Hodgkins*, and Mr. *Hodgkins* made over the coal substantially to the railway company. I do not mean to say that the coal became the property of the railway company, but the company substantially purchased the right to have it always remaining in the earth, and the consequence is that the whole matter really was settled when the company paid *Hodgkins* in that form for the coal. Therefore, I am quite prepared to ask your Lordships to maintain this judgment upon these grounds.

I will say a word more upon one point only, in order that the learned counsel may not think that the argument he addressed to us upon that point did not receive consideration. I refer to the suggestion that under these statutes the directors had the power to bring the lessor into the field, and settle with him at the time when Mr. *Hodgkins* gave them notice. That argument does not seem to me to be borne out by the sections of the statute. The introduction into the other Act of the *Lands Clauses Consolidation Act* is an introduction of a partial nature only. All the clauses in the *Lands Clauses Act* which apply to the taking of lands by agreement or by compulsion are not introduced. The only clauses introduced into the Act are those clauses which define, provide for, and point out the method of arriving at the amount of compensation in any case to be awarded. It is a reference to the *Lands Clauses Act* which we know is very frequent in modern legislation. It is the commonest thing in the world to find in any statute relating to the taking or using of land for public purposes a reference of this kind, and a provision that the compensation shall be settled in the manner provided by the *Lands Clauses Consolidation Act*, and that reference, so far as I am aware, has always been exclusively applied to the section of that Act which defines the machinery for that purpose.

Therefore, my Lords, I hope that your Lordships will agree with the proposal that has been made to you to confirm the decree of the Court below, and dismiss this appeal with costs.

LORD O'HAGAN :—

I fully concur with my noble and learned friends. The construction for which the Appellant contends seems to me to be

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

inconsistent with the plain policy of the statute, and to involve consequences so unreasonable and unjust as to warrant its rejection, unless the Legislature has coerced us, by plain words, to adopt it. No doubt some difficulty arises if we take the 78th section literally. But it cannot be so taken. Its operation cannot be confined to a single owner, lessee, or occupier, although each of those words, *per se*, points only to an individual. The prevention of the working of the mine must affect others, and many others, or it would wholly fail of its object. It must confessedly affect, and with binding force, at least all who derive from the receiver of compensation, his assigns, his heirs, and his representatives, and therefore the literal interpretation is inadmissible.

This being so, the section itself appears to me plainly to indicate that the preventive operation was intended to be permanent, and that when the company fulfils the prescribed conditions, the stoppage must be continual and made once for all. The purpose to be accomplished is declared in the words, "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway." That is, permanently to damage them—not for a month, or a year, or during the continuance of a particular term or letting—but as long as the railway continues to be worked, and requires to be guarded against the fatal mischief of having the mines or minerals on which it rests, removed.

And then, "if the company be willing to make compensation for such mines, or any part thereof," the owner or occupiers "shall not work or get the same." That is, the directors are to make compensation, not for a temporary user or a limited control, but for "the mines," for the entire interest in the mines, that, once for all and for all time, they may forbid the working which they know must be ruinous if ever it should occur.

Taking the words to which I have referred in connection with he 80th and 82nd sections of the Act, it seems to me impossible to doubt that the control of the company was intended to be permanent, and, that the disability of the owner, whatever his estate, was to attach, for its protection, to all persons under all circumstances and for ever. Manifestly such a provision was essential for the security of railways and the safety of the public;

and it does not bear hard upon reversioners or any others, because, for the reasons and to the extent already fully stated, they are enabled to obtain any compensation to which they may be fairly entitled through the machinery of the *Railways Clauses Act.*

In the case before us the lease of *Hodgkins* constituted, substantially, a sale of the coal. Its value was estimated on the face of the instrument, and the payment was, as for rent, arranged with the plain understanding that the whole of it should be removed, within the term of fifteen years. As Lord Justice *Mellish* said: "in the case of minerals, if a man is a lessee of minerals, and has time to take the minerals, and has the right to take the minerals, he does take the minerals, however limited his interest may be; and, when he has once taken and got the minerals and sold them, the person who has to come in after him is just as much deprived of the minerals as if the person who got them had been the owner in fee simple." Here the lessee had the right and the time to take the minerals, and therefore a property in them over which he had full control. He sold that property and got the worth of it in the way indicated by my noble and learned friend who last addressed your Lordships, and with him I confess I have difficulty in discovering the existence of any real loss of which the reversioner can complain. The coal was disposed of, purchased, and paid for; and there was an end of any claim to it, save on the part of the compensating company. It was not, as has been well put at the Bar, the case of a farm or of a house, to be used during a term and go back to the owner at the end of it. Here the lessee bought the coal and sold it, and got the price of it, and the offer of the Respondents, which will be made effective by your Lordships' judgment, seems to me to have given the Appellant more than he has any right to demand. But, even if it be otherwise, and, either with reference to royalties or anything else, he has a title to any farther compensation, he may enforce that title effectually by a proceeding under the 6th section of the *Railways Clauses Act.*

Therefore, it appears to me that the construction contended for by the Respondents is reasonable, consistent with public policy, in harmony with the objects and provisions of the statute, and incapable of working injustice to anyone. On the other hand, the

H. L. (E.) 1877 SMITH v. GREAT WESTERN RAILWAY CO.

Appellant's construction denying the finality of the arrangement with the directors under the statute, and the permanence of the stoppage of the working, would open the way to continual claims by successive persons, and compel repeated payments for property paid for already. It would thus do flagrant wrong to railway proprietors, and imperil the public safety by enabling claimants rightly or wrongly to serve notices which, if neglected on the part of railway directors for a few days, would warrant the removal of minerals absolutely essential to the support of the railway and the preservation of the lives of the passengers upon it. Such a condition of things could not have been contemplated by the Legislature, and the provisions of the statute, although not altogether free from obscurity, in no way compel your Lordships to give it your approval.

I am clearly of opinion that the appeal should be dismissed.

LORD GORDON:—

My Lords, I accede to the view which has been expressed by the noble and learned Lord who spoke second with reference to the construction of the Act, but I fully concur also with the view expressed by the Lord Chancellor as to the mode of dealing with this case, and I think, if I may so express it, a very judicious arrangement will have been made under the judgment proposed to be pronounced by your Lordships.

In addition to the difficulties arising under the *Railways Clauses Act* itself, a difficulty was suggested as to the mode and extent to which the *Lands Clauses Act* may be introduced into the argument. And in addition to that, I, as a Scotch lawyer, find that there are also complications arising from the mode in which the parties have dealt with one another. I have no hesitation, however, on the case as it stands, in expressing my concurrence with the proposed judgment.

An Order was afterwards entered on the Journals to the effect proposed by the Lord Chancellor, but setting forth, in detail, the words of the decree proposed to be altered, and concluding with this direction:—And that the said Order, subject to the abovementioned variations, be, and the same is, hereby affirmed, and

that the Appellant do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And that the cause be, and the same is, hereby remitted back to the Chancery Division of the High Court of Justice, to do therein as shall be just and consistent with these variations and this judgment.

Lords' Journals, 13th November, 1877.

Solicitors for the Appellant: *E. Flux & Leadbitter.*
Solicitor for the Respondents: *R. R. Nelson.*

[HOUSE OF LORDS.]

THE DIRECTORS, &c., OF THE METROPOLITAN RAILWAY COMPANY . . . } APPELLANTS;
AND
JOHN JULIAN JACKSON . . . . . RESPONDENT.

Railway—Negligence, Evidence of.

Whether there is reasonable evidence to be left to the jury of negligence occasioning the injury complained of, is a question for the Judge. It is for the jury to say whether, and how far, the evidence is to be believed.

J. was a passenger by a railway; the carriage in which he rode was full. At station *G.* three persons forced themselves in, and were obliged to stand. There was no evidence that a complaint on this matter had been made to the railway officials, or that they knew of the fact. At station *P.* some other persons opened the door of the carriage, shut it again, and went away. There was, afterwards, a rush on the platform, and other persons opened the door of the carriage. *J.* stood up to prevent their entering, the train moved; *J.*, to save himself from falling, put his hand upon the edge of the door of the carriage; at that moment a railway porter came up, pushed away the persons trying to get in, and slammed the door to, in doing which *J.'s* thumb was caught and crushed:—

Held, that this evidence did not establish such negligence on the part of the company as could be said to have occasioned the mischief, and the Judge ought so to have directed the jury.

Misapprehension as to *Bridges* v. *The North London Railway Company* (1) corrected.

THIS was an appeal against a decision of the Court of Appeal, affirming a decision of the Court of Common Pleas.

(1) Law Rep. 7 H. L. 213.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

The facts, which are fully detailed in the judgments, were, in substance, these:—Mr. *Jackson* was, on the 18th of July, 1872, a passenger by the *Metropolitan Railway*, going from the City westwards. At *King's Cross Station* the carriage in which he rode was full. At *Gower Street Station* (there being a great demand for seats) three persons forced themselves in, but, there being no seats vacant, were obliged to stand. At the *Portland Road Station* there was a rush of fresh passengers. The door of the carriage in which *Jackson* sat was opened by some persons, who looked into the carriage, saw it full, and shut the door. Then others came, opened the door again, and some persons tried to get into the carriage. Mr. *Jackson* rose from his seat to prevent them. While standing with his hands and arms extended, the train moved forward, a railway porter turned away the persons who had tried to get in, and, as the train moved forward and was entering the tunnel, hastily shut the door. Mr. *Jackson*, feeling the train begin to move, had put his hand on the lintel of the door to save himself from falling, and it was just at that moment that the porter slammed the door, and Mr. *Jackson's* thumb was caught by the door, and crushed. That was the cause of action.

The directors by their pleas denied their liability. At the trial before Mr. Justice *Brett*, in December, 1873, there was no evidence given to shew that at *Gower Street* or at the *Portland Road Station* any complaint had been made to the officials of the three extra persons in the carriage, though there was evidence that Mr. *Jackson* had remonstrated with the persons themselves. A witness named *Underwood* stated that he did not see a guard or porter at the *Gower Street Station*. The learned Judge ruled that there was evidence of negligence to be submitted to the jury, and the jury found a verdict for the Plaintiff, with £50 damages.

A rule was obtained to set aside the verdict and enter a nonsuit or a verdict for the Defendants, on the ground that there was no evidence of negligence proper to be left to the jury. On the 13th of November, 1874, this rule was discharged (1). The case was taken to the Court of Appeal, where Lord Chief Justice *Cockburn* and Lord Justice of Appeal *Amphlett* were for affirming the judgment, and Lord Chief Baron *Kelly* and Lord Justice of Appeal *Bramwell* were for reversing it.

(1) Law Rep. 10 C. P. 49.

As the Court was thus equally divided, the judgment of the Court below stood as affirmed (1).

Mr. *McIntyre*, Q.C., and Mr. *Kemp*, Q.C., for the Appellants:—

The question whether the facts proved in evidence constitute what the law recognises as negligence, is a question of law for the Judge, and must not be submitted to the jurors for them to draw the inference of negligence. Here there was no evidence of actual negligence, and the Judge ought to have directed the jury that no act of negligence, which could be treated as occasioning the injury complained of, had been proved. *Bridges* v. *The North London Railway Company* (2) had been misunderstood. There the acts done by the company's servants were directly connected with the happening of the mischief—here they were not. It was the Plaintiff's own act that occasioned the injury; and that brought the case within *Siner* v. *The Great Western Railway Company* (3). *Robson* v. *The North Eastern Railway Company* (4), and *Rose* v. *The North Eastern Railway Company* (5), were also cited.

Mr. *Mellor*, Q.C., Mr. *Macrae Moir* (Mr. *Lewis E. Glen* with them), for the Respondent:—

The Appellants' own evidence shewed that the Appellants had been guilty of negligence; they were not prepared with a proper staff of officers to meet the demand of a crowd of persons coming to obtain places. Of course the result was an unchecked rush to the carriages, and then mischiefs were sure to follow. That had been the cause of the mischief here, and that established the right of the Plaintiff to a verdict. The whole case had been properly laid before the jurors, and they had come to the clear conclusion that there was negligence here, and they had therefore awarded substantial damages. In all these cases the question was whether the facts proved did not establish negligence. The jurymen thought that they did, and that was a matter, negligence or no negligence, which could not be withdrawn from the cognisance of the jury. That was the course followed in *Bridges* v. *The North*

(1) 2 C. P. D. 125.
(2) Law Rep. 7 H. L. 213.
(3) Law Rep. 3 Ex. 150; 4 Ex. 117.
(4) 2 Q. B. D. 85.
(5) 2 Ex. D. 248.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

London Railway Company (1), and it had been properly followed here. *Cockle* v. *The London and North Eastern Railway Company* (2) shewed that negligence of the sort shewn in this case would make the company liable.

Mr. *McIntyre* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case an action was brought by the Respondent against the *Metropolitan Railway Company* for negligence in not carrying the Respondent safely as a passenger on the railway, and for injuring his thumb by the act of one of the Appellants' servants in suddenly and violently closing the door of the railway carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord *Coleridge*, Mr. Justice *Brett*, and Mr. Justice *Grove*, were of opinion that there was such evidence. The Court of Appeal was equally divided; the Lord Chief Justice and Lord Justice of Appeal *Amphlett* holding that there was evidence, the Lord Chief Baron and Lord Justice of Appeal *Bramwell* holding that there was not.

The facts of the case are very short. The Respondent in the evening of the 18th of July, 1872, took a third-class ticket from *Moorgate Street* to *Westbourne Park*, and got into a third-class compartment; the compartment was gradually filled up, and when it left *King's Cross* all the seats were occupied. At *Gower Street Station* three persons got in and were obliged to stand up. There was no evidence to shew that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the Respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at *Gower Street*.

At *Portland Road*, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was no

(1) Law Rep. 7 H. L. 213. (2) Law Rep. 7 C. P. 321.

evidence to shew by whom either act was done. Just as the train was starting from *Portland Road* there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The Respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the Respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at that moment, by the door being slammed to, the Respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury found a verdict for the Respondent with £50 damages. There was not, at your Lordships' bar, any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

the company was really blameless. It may be said that this would be set right by an application to the Court in banc, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial; and on a second trial, and even on subsequent trials, the same thing might happen again.

In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriæ*. In the present case there was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the *Gower Street Station;* and it may also have been negligence if they saw these supernumerary passengers, or if they ought to have seen them, at *Portland Road*, not to have then removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place. If, when the train was leaving *Portland Road*, the overcrowding had any effect on the movements of the Respondent; if it had any effect on the particular portion of the carriage where he was sitting, if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence; but no evidence of the kind was given.

As regards what took place at *Portland Road*, I am equally unable to see any evidence of negligence connected with the accident, or indeed of any negligence whatever. The officials cannot, in my opinion, be held bound to prevent intending passengers on the platform opening a carriage door with a view of looking or getting into the carriage. They are bound to have a staff which would be able to prevent such persons getting in where the carriage was already full, and this staff they had, for the case finds that the porter pushed away the persons who were attempting to get in. So also with regard to shutting the door; these persons had opened the door, and thereupon it was not only proper but necessary that the door should be shut by the porter; and, as the train was on the point of passing into a tunnel,

he could not shut it otherwise than quickly or in this sense violently.

I have looked with some anxiety in order to discover what was considered by the learned Judges in the Courts below to be the evidence from which negligence might be inferred in this case. Lord *Coleridge* mentions two points of negligence: first that there was no attempt made to remove the extra and inconvenient number of passengers from the carriage in which the Respondent was seated when the company had an opportunity of doing so at the station; and secondly, that there was an uncontrolled action on the part of a number of persons on the platform, which action was not controlled and could not be controlled by reason of the want of sufficient servants of the company, who were to a reasonable extent bound to control it.

As to the first of these grounds, I have already said that admitting the negligence it appears to me to be in no way connected with the accident. As to the second, I do not think that there was an uncontrolled action on the part of the persons on the platform, for the case finds that the porter of the company did, in a way which seems to be both natural and proper, control the action of those who wished to get into the carriage.

Mr. Justice *Brett* in substance concurs with Lord *Coleridge*, and I do not know that there is any substantial difference in the view taken by Mr. Justice *Grove*.

In the Court of Appeal, however, Lord Justice *Amphlett* founded himself at the outset on the case of *Bridges* v. *The North London Railway Company* (1) in this House. He states (2), "It is now settled by that case, (though previously doubted by many eminent Judges,) that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding Judge." And in like manner the Lord Chief Justice states at the conclusion of his judgment (3): "All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the Plaintiff with that negligence as its cause, or as materially

(1) Law Rep. 7 H. L. 213. (2) 2 C. P. D. at p. 127.
(3) Ibid. at p. 145.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

contributing thereto. I cannot doubt, especially after the decision of the House of Lords in *Bridges* v. *The North London Railway Company* (1), that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding Judge to leave to their decision."

These expressions of the learned Judges appear to me to be of great importance, for I infer from them that if they had not considered the case of *Bridges* v. *North London Railway Company* (1) to have the effect which they attribute to it, their decision in the present case might have been different. Now, my Lords, I am bound to say that I cannot look at the case of *Bridges* as in any degree establishing the proposition which it appeared to Lord Justice *Amphlett* to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts is itself a question of fact for the jury, or as establishing the proposition which it appeared to the Lord Chief Justice to establish, namely, that the jurors are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause, or as materially contributing thereto. Your Lordships, in the case of *Bridges*, did not lay down, and I am satisfied your Lordships did not mean to lay down, any new rule upon this subject. It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred. In the case of *Bridges* there was a series of facts from which your Lordships, advised as you were by several of the learned Judges, thought that negligence might very reasonably have been inferred. There was the stopping of the train on a dark night in a tunnel badly lighted, and filled with steam; a heap of hard rubbish and no platform opposite to the carriage; the name of the station called out from the platform, and, after a short interval, when the train moved on, but not before some passengers had got out, a second cry, "Keep your seats!" One of those passengers was heard to groan, and was found lying with his legs across the rails. In addressing your Lordships, I myself stated (2) that "if it had fallen to me to review a verdict

(1) Law Rep. 7 H. L. 213. (2) Law Rep. 7 H. L. at p. 239.

of a jury given against a company under these circumstances, without any evidence to explain the facts, I should have been of opinion that the jury had come to a natural and proper conclusion, but that the only question which your Lordships had to deal with was, Was there evidence of negligence to go to a jury? And that in my opinion there clearly was." And I farther stated (1) that I trusted the case might be found useful in future as negativing the idea that, under circumstances such as described, the case was to be withdrawn from the jury.

In the present case, on the other hand, I can find no such evidence, and therefore I feel obliged to move your Lordships that the judgment given for the Plaintiff in the Court below should be reversed, and a nonsuit entered, the Respondent, according to what is usual in such cases, paying the costs of the appeal along with the costs below.

LORD O'HAGAN:—

My Lords, in this case as it has been presented to your Lordships, the single question is, was there *any* evidence which should have been submitted to the jury?

I shall just advert to the judgment in *Bridges* v. *The North London Railway Company* (2), which in the interpretation given to it by some of the learned Judges in the Court below would be decisive against the Appellants. I was not a party to that judgment, and I did not hear the statements of opinion addressed to this House by the noble and learned Lords who then advised it, but I have read with great attention the report of those statements, and I quite concur with my noble and learned friend that they established no new principle. They left the law as it was, and as it ought to be. They dealt with the particular circumstances in evidence, and merely decided that as those circumstances plainly justified the imputation of negligence to the company, they should not have been withheld from the consideration of the jury. That case does not seem to me, in any way, to take from the Judge the duty and responsibility of determining as to the existence or non-existence of evidence fit to be considered. It simply affirms a proposition, which no one can dispute, that, when such evidence

(1) Law Rep. 7 H. L. at p. 240. (2) Law Rep. 7 H. L. 213.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

exists, the jury must be allowed to decide as to its weight and value. Your Lordships have never held that, when negligence is alleged, any state of facts assumed to bear upon the issue can be made the subject of inference by jurors, although not really connected with the issue before them. The consequences of such a doctrine would be disastrous, and it is of high importance that the authority of the Judge should restrain a latitude of decision which might often, in the result, be very inconsistent with reason and justice. I concur, therefore, with the concluding observation of the Lord Chancellor, that the authority of *Bridges* v. *The North London Railway Company* (1) does not affect, and cannot govern, the case before your Lordships. I have felt it necessary to say so much of that case in the first instance, because it appears to have materially affected the judgment of the Court below, and because I think it ought not, when properly understood, to embarrass your Lordships in considering the evidence in this case, to which I shall now briefly address myself.

The complaint of the Respondent is very succinctly put in his declaration. It is confined to this,—that "by the negligence of one of the servants of the Defendants one of the doors of the carriage" (in which he was travelling) "was suddenly and violently closed, and thereby one of the thumbs of the Plaintiff was smashed and injured." That is the complaint. It was for the Judge to see if anything in the proofs sustained it; and the same obligation is now cast upon your Lordships.

The material facts are few and undisputed. They have been clearly stated, and I shall not detail them again. It is conceded that at the *Gower Street Station* three persons got into a compartment which was already full; that at the *Portland Road Station* they remained standing up in it; that the door was opened then, and shut and opened a second time when there was a rush after the train had started; that a porter put away those who were endeavouring to enter, and closed the door rapidly as the train was entering a tunnel; and that the Respondent, who had risen to prevent the coming in of other passengers and was thrown forward by the movement, placed his hand on a hinge of the door to save himself, and had his thumb injured by the closing of it.

(1) Law Rep. 7 H. L. 213.

I gather, by the notes of the learned Judge who presided at the trial, that some other circumstances were disclosed, but our attention must be confined to those which are set out in the case. Considering these with care, I am unable to come to the conclusion that they establish negligence against the company.

The Respondent does not rely upon any single act in proof of negligence. A series of events is taken consecutively, and, from the whole, it is argued that the jury had ground for inferring it. I find it a little difficult to ascertain the precise ground of the judgments we are considering. One of the learned Judges is of opinion that the entrance of the three extra passengers furnishes no evidence of negligence; and two others appear to have held that none was furnished in the fact that the railway porter "slammed" the door at the time and in the manner at and in which it was closed. Mr. Justice *Grove* seems to me to have put the matter fairly when he said, that it must be considered whether the alleged conduct of the company or its servants can be fairly said to have been the cause of the accident; and I agree with him that it is not necessary to establish negligence, that it should, so to speak, "consist of one act or one negligence only." "You may put other things together which are reasonably proximate to the accident and come sufficiently near not to be the cause in the very remote sense of the word. And you are not obliged to rely on a single thing, and to say that single thing must be enough to establish negligence." I quite concur in this; but I will add that, to make them available for that purpose, the several things relied on, or some of them, must be connected with the accident as having more or less contributed to produce it.

Now, take the transaction in its several stages. I do not go so far as Lord Justice *Amphlett,* and say that the Appellants were blameless in permitting the intrusion of extra passengers at the *Gower Street Station.* I think it is conceivable that they might have prevented that intrusion without incurring unreasonable expense or inconvenience, by a rapid inspection of the carriages and the removal of those whom there was not space comfortably to accommodate. It is not necessary to give an opinion upon this point, but I am not prepared to say that if the overcrowding had been connected with the accident as in any way to be its cause,

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

the company might not have been liable. But because I fail to find any such connection demonstrated by proof, I cannot say that the liability has arisen. *Ex concessis*, the over-crowding *per se* would have given the Respondent no ground for this action, and the subsequent events do not appear to me to make it more effective for that purpose.

The same observation applies to the continuance of the extra passengers in the carriage at the *Portland Road Station*. It ought not to have been permitted; and, again, I can conceive circumstances in which it might found or aggravate a claim against the Appellants. But, like the original overcrowding, I do not think it has been connected with the injury of the Respondent as having caused it or contributed to it, and therefore it was not fit to be presented to the jury as a ground for inferring liability. The overcrowding and continuance together may well perhaps be taken to impeach the administration of the company, and give reason for complaint of its arrangements, although, even as to this, I note that some of the learned Judges are of opinion that there was no cause of blame, and we are not required to decide as to the correctness of their views in that respect. But it may not unfairly be conceived that when the case was left at large to the jurors they were not indisposed to take into the account what they might have considered, on public grounds, culpable mismanagement, and attached to the company a responsibility for which, at least in this action, the company was not required to answer.

I am sure that your Lordships would be very slow to limit the legitimate authority of juries in relation to railway cases, for it furnishes, in its honest and vigorous exercise, the best, and sometimes the only, protection, which the general public possess against the default, shortcoming, or mismanagement of companies. They are potent monopolies, comparatively little subject to the various forms of control which law and opinion exercise upon individuals, and but for the action of juries in preventing negligence and disregard of the general comfort and safety, the want of that control would be a great mischief to society. It is essential, however, to the maintenance and efficiency of the wholesome influence of juries, that it should be confined within its fitting sphere, and prevented from operating without proper cause or on insufficient evidence.

I think there is nothing in evidence which leads to the conclusion that if at *Gower Street Station* the three passengers had been kept from entering the carriage, or if, at *Portland Road Station*, they had been excluded from it, the Respondent would have escaped the mischief which unfortunately befel him.

All that occurred subsequently was this: Some one opened the door of the carriage and closed it; the train got into motion and a rush was made, and the door was opened. Who made the rush, whether many or few, does not appear; but the single porter was adequate to put away those who made it; and in "slamming" the door as the train entered the tunnel, he surely did nothing but his duty. He did what was right and reasonable, and if he had failed to do it, and evil had resulted from the swinging of the open door in the dark tunnel, there would have been real ground for making his employers answerable in damages. I do not find that any of the learned Judges censure him; and yet his act seems the only one for which, as having caused the injury, the Respondent in his pleading seeks redress against the Appellants, and the only one for which, if for anything in this action, they appear to me to be responsible. Can it be said that they were culpable because some one on the platform opened the door and closed it when he saw that the carriage was full? Can they be held to be so because there was a "rush" of one, or two, or three persons, hurrying to get into the moving train, from which they were kept away by the single porter, after they had opened the door? Is it possible, dealing with the case reasonably and in the light of our every-experience, that we can discover negligence in any one of these things? There is nothing in the case to shew, as was suggested in the Courts below, that there was a large crowd on the platform, or that the staff upon it was insufficient for ordinary purposes. On the contrary, as the Lord Chancellor has already observed, the porter found no difficulty in pushing away the people who had opened the door and so exercising all the control which apparently was needful under the circumstances.

What more is there in the case? The Respondent, as I have said, who had not complained to the porters on the entrance of the extra passengers, and who had not required their removal, rose from his seat and held up his hand to prevent the intrusion of others.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

The motion of the train threw him forward, his hand caught at the door, and his thumb was crushed by its closing. His own action, which was natural and reasonable, in combination with the perfectly innocent proceeding of the porter, accomplished the injury, and I wholly fail to see that the overcrowding had anything to do with it. The same occurrence, with the same result, might have taken place if the proper number of passengers had been in the carriage. The opening of the door, the intervention of the porter, the quick slamming, all might have occurred exactly in the same way if the intruders had never entered or had been removed, and the Respondent might equally have risen from his seat and held up his hand, as he would have been warranted in doing, to prevent the entry of persons for whom there was no room. Can we speculate as to the amount of added motive to such a course from the greater inconvenience of the greater overcrowding? I think it would be difficult and dangerous to attempt it.

And then we have no proof as to the relative position of the Respondent and the other passengers in the carriage, and how far the presence of those who ought not to have been there may have been useful or detrimental to him. It is quite conceivable that one or other of those persons may have been so placed between him and the door as to render the danger less than it otherwise might have been. Again, we cannot speculate, in the absence of proof, or say what might have happened if things had been ordered otherwise. Putting the matter at the lowest, I think your Lordships will be safe in adopting the view of Lord Justice *Bramwell:* "supposing the evidence to be consistent with negligence, namely, that negligence may have caused the matters complained of, it is equally consistent with no negligence, namely, that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that when the evidence is consistent as much with one state of facts as with another, it proves neither."

On these grounds I am of opinion that the Respondent has failed to establish his claim, or to offer any evidence in support of it which should have been submitted to the jury, and that, therefore, the appeal should be allowed and a nonsuit entered.

LORD BLACKBURN:—

My Lords, I also am of opinion that in this case the judgment should be reversed, and a nonsuit entered. On a trial by jury it is, I conceive, undoubted that the facts are for the jury, and the law for the Judge. It is not, however, in many cases practicable completely to sever the law from the facts.

But I think it has always been considered a question of law to be determined by the Judge, subject, of course, to review, whether there is evidence which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether and how far the evidence is to be believed. And if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law whether from those facts that farther inference may legitimately be drawn.

My Lords, in delivering the considered judgment of the Exchequer Chamber in *Ryder* v. *Wombwell* (1), *Willes*, J., says: "Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the verdict for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the Plaintiff, or direct a verdict for the Plaintiff if the *onus* is on the Defendant. It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the Judge (subject, of course, to review), is, as is stated by *Maule*, J., in *Jewell* v. *Parr* (2), "not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

(1) Law Rep. 4 Ex. 38. (2) 13 C. B. 916.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

He afterwards observes (1), very truly in my opinion, "There is no doubt a possibility in all cases where the Judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the Judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the Court below on such a point is reversed, the majority must have been so either in the Court above or the Court below. This is an infirmity which must affect all tribunals."

I quite agree that this is so, and it is an evil. But I think it a far slighter evil than it would be to leave in the hands of the jury a power which might be exercised in the most arbitrary manner. On this I perfectly agree with the remarks already made by the Lord Chancellor, and I do not repeat them.

My Lords, in all cases of actions to recover damages for a personal injury against railway companies the Plaintiff has to prove, first, that there was on the part of the Defendants a neglect of that duty cast upon them under the circumstances; and, second, that the damage he has sustained was the consequence of that neglect of duty. A third question, viz., whether the Plaintiff is himself to blame comes more properly by way of defence.

Now, in applying the rule of law laid down in *Ryder* v. *Wombwell* (2) to such cases there had been much difference of opinion among Judges. In some of the cases it was imputed to the Judges who had decided in favour of the companies that they had acted as if a Judge whenever he thought a verdict for the Defendant would be unsatisfactory was entitled to withdraw the case from the jury. I do not pause to inquire whether this imputation was just or not. If they did so act, I agree that it was a wrong principle, and I agree also that *Bridges* v. *The North London Railway Company* (3) is an authority, if one were wanted, to shew that it was a wrong principle.

But since the decision of your Lordships' House in *Bridges* v. *The North London Railway Company* (3) it has been more than once said in the Courts below that your Lordships had not, perhaps, overruled the law laid down in *Ryder* v. *Wombwell* (2), but at least laid down this exception to it, that in cases of railway acci-

(1) Law Rep. 4 Ex. 42. (2) Law Rep. 4 Ex. 32.
(3) Law Rep. 7 H. L. 213.

dents the jurors were to decide. In *Robson* v. *The North Eastern Railway Company* (1) Lord Justice *Brett* says: "The House of Lords held that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury ought to decide." My Lords, I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive. Lord Justice *Amphlett*, in the present case, says: "In considering this question we must bear in mind that it is now settled by the case of *Bridges* v. *The North London Railway Company* (2) (though previously doubted by many eminent Judges) that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding Judge;" and Chief Justice *Cockburn* indicates, I think, at least a partial agreement in this view of that decision.

My Lords, if that was the decision of your Lordships, there would be an end of this case. For I apprehend that after a position of law has been laid down judicially in this House, it is no more competent for your Lordships to depart from it than it would be for an inferior tribunal to do so.

But I own myself unable to see anything in *Bridges* v. *The North London Railway Company* (2) which justifies the conclusion that your Lordships either laid down, or meant to lay down, any new rule on the subject. I think the utmost extent to which your Lordships' decision in that case can be fairly pressed is, that in such cases the Judges should be cautious before they say that the jury could not legitimately draw the inference which in fact they did draw; and to this I agree.

My Lords, as to the facts of the present case I have little to say. I think that the Plaintiff was entitled to be carried in a carriage with reasonable accommodation, and that there is evidence that at *Gower Street*, either from there being too few officials, or from these officials neglecting their duty, too many passengers were put in the same carriage with him, and for any damage resulting therefrom he had a case to go to the jury. But I can see no evidence from which the inference could be legitimately drawn that the Plaintiff's thumb was crushed at *Portland Road*

(1) 2 Q. B. D. 89. (2) Law Rep. 7 H. L. 213.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

because of this neglect of duty at *Gower Street*. The reasoning by which it is sought to say that the jury might legitimately connect the fact that the Plaintiff's thumb was in the hinge of the door at *Portland Road* with the negligence at *Gower Street*, seems to me a good example of what Lord *Bacon* means in his Maxims, when he says, "It were infinite for the law to consider the causes of causes, and their impulsion one of the other." Nor do I see any evidence of negligence at *Portland Road*. The company, I think, ought to take reasonable steps to prevent people getting into carriages already full, and this the Defendants' porter did; but it would be going much farther than I think is reasonable to say that the duty of the railway company was to prevent any one from opening the door in order to look into the carriage and see if there was room. The company's servant did quite right in preventing the persons who did this from entering, and in shutting the door; the misfortune was, that, at the moment he did so, the Plaintiff's thumb was in the hinge of the door, but that the porter could not anticipate.

LORD GORDON:—

My Lords, the facts of this case are very simple, and have been very distinctly stated by your Lordships who have preceded me, and it is unnecessary that I should repeat them.

The declaration alleges that the injury sustained by the Respondent was caused by the negligence of one of the servants of the Defendants, in suddenly and violently closing one of the doors of the carriage in which the Plaintiff was being conveyed; and the question now before your Lordships is, whether there was evidence of negligence given at the trial to go to the jury.

The duty of a Judge in such a case is an exceedingly delicate one, as the line of division between what is proper to be submitted to the jury, as necessary to support a charge of negligence in point of law, and what may be submitted to the jury as sufficient to support a charge of negligence in point of fact, is often a very narrow one. But I agree in what was said by Mr. Justice *Willes*, in the case of *Ryder* v. *Wombwell* (1), which has been quoted by Lord *Blackburn*, that "there is in every case a preliminary ques-

(1) Law Rep. 4 Ex. 32, at p. 38.

tion, which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the Plaintiff, or direct a verdict for the Plaintiff if the *onus* is on the Defendant."

In the case of *Bridges*, which has also been referred to by your Lordships, Mr. Baron *Pollock*, one of the consulted Judges, after referring to what I have just quoted from Mr. Justice *Willes*, in the case of *Ryder*, says, and I concur with him (1), "This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence is usually one of pure fact, and therefore for the jury, it is the duty of the Judge to keep in view a distinct legal definition of negligence as applicable to the particular case, and if the facts proved by the Plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration."

In the present case I must say that during the argument I felt much inclined to agree with the view taken of the decision of this House in the case of *Bridges* by the Lord Chief Justice, and Lord Justice *Amphlett*, and to hold that it had been settled by that case, that the question whether negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the presiding Judge. But having considered that case more maturely, with the assistance which your Lordships have received from his Lordship on the woolsack, who took part in that decision in this House, I am now satisfied that the view taken by these learned Lords was not the right one, and that no fixed or general rule, such as was supposed by these learned Lords, was laid down by the case of *Bridges*. I concur with your Lordship on the woolsack in thinking that it is impossible to lay down any rule, except that from any given state of facts the Judge must say whether negligence can be legitimately inferred, and if the Judge is of that opinion, then that it is for the jury to say whether it ought to be inferred.

(1) Law Rep. 7 H. L. at p. 221.

H. L. (E.) 1877 METROPOLITAN RAILWAY CO. v. JACKSON.

On the state of the facts before the House in the present case, I come to the conclusion that no negligence, connected with or conducing to the accident, was proved on the part of the Appellants, and that the Judge who tried the case ought to have so ruled. I think the overcrowding of the carriage was not the cause of the accident, and the Respondent does not so allege in his declaration. The people who were overcrowding were *inside* the carriage and did not require to open the door at *Portland Road*, where the accident happened. The door was opened there by people on the *outside* who tried to get in. The porter prevented them, and I think did so rightly. The Respondent, who had a seat, rose or partly rose to push the people back who were trying to enter. The train happened to move on, the Respondent was jerked forward, and put his hand on the hinge of the carriage-door, at the very moment the door was in course of being shut by the porter, and the Respondent's thumb was injured. It was the duty of the porter to shut the door. It is not proved that he saw the Respondent fall forward, or could have prevented the jamming of his thumb. I think there is no evidence of negligence in what took place at *Portland Road*, and that what happened was a pure accident, for which the Appellants were not responsible; and that the Judge who tried the case should have so ruled.

I therefore concur in thinking that the judgment given for the Respondent in the Court below should be reversed.

Judgment given for the Plaintiff in the Court below reversed, and a nonsuit to be entered; Respondent ordered to pay to the Appellants the costs of the appeal and the costs in the Court below.

Lords' Journals, 13th December, 1877.

Solicitors for the Appellants: *Burchells.*
Solicitors for the Respondent: *Tillyard & Gribble.*

[HOUSE OF LORDS.]

HARRY TOMKINS AND JOHN LYON . . APPELLANTS;

AND

JOHN JOSEPH SAFFERY . . . . . RESPONDENT.

H. L. (E.)
1877
Nov. 16.

Stock Exchange Rules—Bankruptcy—Bankruptcy Act, 1869.

The rules of the *Stock Exchange* as to defaulting members of the body are the rules of a domestic forum, which have no influence on the rights of those who are not amenable, as members, to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member.

C. was a member of the *Stock Exchange;* he became unable to meet his *Stock Exchange* engagements, and he gave notice thereof to the secretary. In such a circumstance the rules of the *Stock Exchange* prescribe the course to be followed. The defaulter ceases to be a member of the body. Two members of the body act as official assignees of the defaulter, a meeting of the creditors is called, the defaulter (as he is required to do) makes his statement, and the assembled creditors having decided what is to be done, these official assignees carry the decision into execution. The committee of the *Stock Exchange* has the power to re-admit the defaulter or to refuse him re-admission. *C.* made his statement at the first meeting, declaring, at that time, that he had no debts outside the *Stock Exchange.* His *Stock Exchange* creditors then consented to accept a composition; and, to provide for a part of it, he, at the demand of the official assignees, gave them a cheque for £5000 then standing to his credit in the *Bank of England.* The official assignees obtained the money and apportioned it among his *Stock Exchange* creditors. He afterwards confessed to owing debts to a large amount to outside creditors, and was declared a bankrupt. The trustee in bankruptcy, on behalf of the general creditors, claimed from the official assignees of the *Stock Exchange* the £5000:—

Held, that he was entitled to claim it; for that what was done by *C.* amounted to a *cessio bonorum*, and constituted an act of bankruptcy.

Per LORD BLACKBURN:—The money was voluntarily paid with the view to give the *Stock Exchange* creditors an undue preference.

Per LORD BLACKBURN:—In the 167th Rule of the *Stock Exchange*, that the assignees shall collect and pay "the assets" to their joint account at a banker's, the word "assets" means the whole of the defaulter's available property; and under the 153rd rule these assets are to be distributed exclusively to those creditors whose claims arise out of *Stock Exchange* transactions.

Quære, whether, when it is intended to transfer to particular creditors the whole of a debtor's property, the transfer of a part in pursuance and performance of that intent, would not be an act of bankruptcy.

The terms of the 92nd section of the *Bankruptcy Act*, 1869, explained.

THIS was an appeal against a decision of the Court of Appeal in Bankruptcy, by which the Appellants, the two assignees officially

H. L. (E.) 1877 TOMKINS v. SAFFERY.

appointed under the authority of the Committee of the *Stock Exchange* in the matter of *J. E. Cooke*, a defaulter on the *Stock Exchange*, were ordered to pay over to the Respondent, the trustee in bankruptcy of *Cooke's* estate, a sum of £5000 (1).

Cooke had been for some years a member of the *Stock Exchange*. On the 27th of April, 1876, being severely pressed by his *Stock Exchange* engagements, he wrote to the secretary of the *Stock Exchange* announcing his inability to meet these engagements.

There is a body of rules regulating the conduct to be observed under such circumstances by members of the *Stock Exchange*, and by one of these rules two of the members are annually appointed to act, upon any declaration of default, as assignees of the defaulting member, to obtain his books and statement of accounts, and to attend, and require him to attend, the meetings of his creditors. In 1876 the two gentlemen, now Appellants, held that office. On receiving *Cooke's* declaration of default they gave notice of it to the *Bank of England*, where he kept his banking account. On the 27th of April they held a meeting of the *Stock Exchange* creditors of *Cooke;* he attended, his own accounts were produced, and *Cooke* was asked, among other things, if he did not owe money to other people, and especially to his father-in-law, Mr. *Mackenzie*. *Cooke* then said that he had no liabilities outside the *Stock Exchange*, and that the various sums of money he had received from Mr. *Mackenzie* were gifts. The *Stock Exchange* creditors consented to receive a composition. *Cooke* asserted the possession of property amounting to £8000, and was required to

(1) Law Rep. 4 Ch. Div. 555, *nom. Ex parte Saffery, In re Cooke;* where the Rules of the *Stock Exchange* on this subject are fully set out. It is sufficient here to state the effect of some of them:—

16. A member may be expelled or suspended by a decision of the committee of the *Stock Exchange*.

142. A member unable to fulfil his engagements may, by the committee, be declared a defaulter.

143. On such declaration he ceases to be a member.

148. Creditors for differences have a prior claim on all differences received by the defaulter's estate.

153. The committee will not recognise any payment or claim that does not arise from a *Stock Exchange* transaction.

The committee may re-admit a defaulter, and the 156th, 163rd, and 164th rules describe the circumstances under which re-admission may take place.

167. "The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

give to Mr. *Tomkins* a cheque on the *Bank of England* for £5000, as a sum to rather more than that amount was there standing to his credit. He did so, and the Appellants (attended by *Cooke's* clerk) received the money. They received it on behalf of *Cooke's Stock Exchange* creditors, and afterwards apportioned it among them.

On the 13th of May *Cooke* filed a petition for liquidation in the *London* Bankruptcy Court, and on the 1st of June he was adjudicated a bankrupt. In the meantime he had admitted the existence of other debts, out of the *Stock Exchange*, and had acknowledged advances to have been made by Mr. *Mackenzie*, his father-in-law, to the extent of £107,000. The Respondent Mr. *Saffery*, who was appointed trustee in *Cooke's* bankruptcy, applied to the Bankruptcy Court for an order on the Appellants to pay over to him, as trustee on behalf of the general creditors, the sum of £5000 which they had received under *Cooke's* cheque. The order was by the Registrar refused. On appeal to the Lords Justices in Bankruptcy, the Registrar's decision was reversed. This appeal was then brought.

Mr. *De Gex*, Q.C., and Mr. *Herschell*, Q.C. (Mr. *Finlay Knight* was with them), for the Appellants:—

This was not an act of voluntary preference. *Cooke* was under pressure at the moment, a pressure which he could not resist. This was not, therefore, like the case of *Wilson* v. *Day* (1), where, too, the Court went on the ground that the assignment was of all the property of the debtor. Nor was it like the case of *Harman* v. *Fishar* (2), where the act done was undoubtedly an act of voluntary preference. In *Hartshorn* v. *Slodden* (3) a debtor gave goods out of his shop in part payment of a bond not then due, and shortly afterwards became bankrupt, but even there it was held that, under the circumstances, the act was not void as a fraudulent preference. [THE LORD CHANCELLOR:—Could the agreement of the *Stock Exchange* creditors to get in this way all they could, defeat the rights of the general creditors?] In itself what was done here was perfectly lawful. The creditors did not get the whole of their

(1) 2 Burr. 827. (2) Cowp. 117.
(3) 2 B. & P. 582.

H. L. (E.) 1877 TOMKINS v. SAFFERY.

debts; they assented to a composition, and they received a sum on account of it. They had a perfect right to do so. *Van Casteel* v. *Booker* (1) decided that, in order to render a preference on the eve of bankruptcy valid, it was not necessary that there should be a previous threat or pressure with an immediate power of enforcing it. But here there was pressure, and there was also the power of enforcing it, as, for instance, by expulsion from the *Stock Exchange*. [LORD BLACKBURN:—That is not legal pressure.] But the law recognises any pressure which naturally produces its effect on the mind of the debtor. An assignment, under pressure, of part of the debtor's property is not an act of bankruptcy: *Smith* v. *Timms* (2). The existence of pressure makes all the difference: *Tempest's Case* (3); *Topham's Case* (4); *Brown* v. *Kempton* (5); and honestly yielding to such a pressure, and giving up a portion of the property, could not be treated as a fraudulent preference.

What was done did not amount to an act of bankruptcy, and the pressure was used, and the cheque obtained, before any act of bankruptcy was committed. In no way whatever did the facts of the case bring it within the 92nd section of 32 & 33 Vict. c. 71 (*Bankruptcy Act*, 1869).

That Act did not alter the law of fraudulent preference, and the case here being clearly not a fraudulent preference within the old law, the transaction must be treated as valid.

If all the property of the debtor had been assigned; if there had been a real *cessio bonorum*, that might have rendered the transaction invalid. But it was not so; only a part of it was transferred. Even a promise to assign all would not have had that effect; it would not have been an act of bankruptcy. [LORD BLACKBURN:—If there is a promise by a debtor to hand over the whole of the property, and at the moment a part is handed over in performance of that promise, would that amount to an act of bankruptcy?] It would not. A deed of composition did not constitute an act of bankruptcy, nor did a deed of inspection. A denuding himself of all his property in favour of a particular creditor would be an act of bankruptcy, for that would be a delaying of all the other credi-

(1) 2 Ex. 691.
(2) 1 H. & C. 849.
(3) Law Rep. 6 Ch. Ap. 70.
(4) Law Rep. 8 Ch. Ap. 614.
(5) 19 L. J. (C.P.) 169.

tors, and perhaps it would be so if it was a colourable surrender of the part of the whole. Here there was no pretence to say that it was anything of the kind. The notice by the *Stock Exchange* committee to the *Bank of England* had been misunderstood and exaggerated. It had none of the legal effect of a distringas, and it did not operate on the whole property of *Cooke*.

To constitute a fraudulent preference in such a case, the wrongful intentions of the debtor and the creditor must concur: *Cheeseborough's Case* (1); *Ex parte Blackburn* (2). There was nothing of the kind here, everything that was done was done *bonâ fide*. The *Stock Exchange* creditors knew that they were creditors of *Cooke*. They were told, and they believed, that *Cooke* had no other creditors, and they fairly, and even generously, said that if he would secure them a certain proportion of their claims by way of composition, they would release him from the rest, and their doing so would have had the effect of securing his re-admission to the *Stock Exchange*. There was no fraud in such conduct, and it was important to him to obtain such compromise, for then he might, under one of the rules of the *Stock Exchange* (the 164th), be re-admitted to the body. On the principle adopted in *Edwards* v. *Glyn* (3), and on the construction given in this House in *Butcher* v. *Stead* (4) to the 92nd section of the *Bankruptcy Act*, 1869, it is clear that, there being here no fraudulent intention on the part of the creditors; no merely voluntary and spontaneous surrender of property by the debtor, but an actual pressure on him to which he was obliged to yield, the payment made by him was valid, and cannot be recalled.

Mr. *Benjamin*, Q.C., and Mr. *Romer*, for the Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the question in this appeal is as to the right of the Appellants, who are styled the official assignees of the *London Stock Exchange*, to retain a sum of £5000, which came into their hands under circumstances to which I shall shortly refer. The

(1) 40 L. J. (Bkcy.) 79.
(2) Law Rep. 12 Eq. 358.
(3) 2 Ell. & Ell. 29.
(4) Law Rep. 7 H. L. 839.

H. L. (E.) 1877 TOMKINS v. SAFFERY.

bankrupt *Cooke* was a member of the *London Stock Exchange*, and in the month of April, 1876, he became unable to meet his engagements, and he then took certain steps which will have to be particularly mentioned, and as to which there is in reality no dispute of fact between the parties, because the narrative of what was done, as given by the bankrupt, tallies in every substantial point with the narrative given in the affidavit of one of the Appellants.

My Lords, what the bankrupt says is this: "On the 27th of April," 1876, "I suspended payment, not being able to meet my engagements on the *Stock Exchange*. On the next day, the 28th of April, which was the pay-day, I was not in the *Stock Exchange* room on that day at all. I was in the room on the 26th of April last, which was the first name-day. I knew then that I could not get through the settling without help, and late in the evening of that day, after business hours, I knew from my father-in-law's solicitors that he had refused to help me, and I still hoped that I might induce him or Mr. *William Mackenzie*, my wife's brother, and the eldest son of Mr. *Edward Mackenzie*, to assist me." Then in the 5th paragraph he says: "On the 27th of April I went to Mr. *William Mackenzie*, who (together with Mr. *Cunliffe*, his solicitor), had had, on behalf of his father, a long interview with me at my office on the 26th to consider the question of affording me assistance to fulfil my engagements, and he told me his father had decided not to help me farther, and had returned home to *Fawley Court*. This was about ten in the morning. At this meeting I asked Mr. *William Mackenzie* whether, if the *Stock Exchange* did not make me bankrupt his father would, and he gave me to understand he would not. I then went to my office, and wrote and sent a letter to the secretary of the *Stock Exchange*, saying I regretted I could not fulfil my engagements. Before writing the letter I saw Mr. *Parker*, one of the secretaries, and told him I should have to declare myself, and I asked him if it was advisable to call together some of my largest creditors first, or to declare myself insolvent at once. Mr. *Parker* said it would not be right to tell one more than another, and that I had better declare myself at once. I then did so by writing the official letter before referred to, and my failure was publicly announced

in the room in the usual way, that was at or about 11 A.M. on the 27th of April last. I did not go into the *Stock Exchange* room on that day, the 27th of April, and have not been in it since." In the 10th paragraph he says: "Immediately on my default being announced in the house, the usual official notice thereof was sent by the official assignees to my bankers—the *Bank of England*—which I am informed practically amounted to a 'distringas' being placed on my balance. Beyond this nothing farther occurred that I recollect, except the closing of my speculative accounts on the *Stock Exchange*, until I received the usual official letter from the official assignees of the *Stock Exchange* (Messrs *Tomkins* and *Lyon*) requesting my attendance with my books at a meeting on that afternoon (the 27th of April)." My Lords, I pause there, I will refer afterwards to what took place at the meeting.

Mr. *Lyon*, one of the Appellants, says: "*Cooke* was a member of the *Stock Exchange* in accordance with the rules and regulations then existing upon the *Stock Exchange*, and of which a copy is now produced to me marked 'A.' On the 27th day of April, 1876, the said *John Edward Cooke*, being unable to meet his engagements on the *Stock Exchange*, announced that fact, and was declared a defaulter in pursuance of the aforesaid rules. Upon the 28th day of April, 1876, a meeting of the creditors of the said *John Edward Cooke* was held on the *Stock Exchange*, at my offices, and at which meeting Mr. *Charles Branch*, of the firm of Messrs. *Foster, Braithwaite, & Co.*, was appointed chairman. The debts then due by the said *John Edward Cooke* upon the *Stock Exchange* amounted to the sum of £24,790."

From these passages which I have read, I think your Lordships will have no doubt in arriving at this conclusion, that the course taken by *Cooke* the bankrupt was in point of fact, and was meant to be, the course pointed out by the rules of the *Stock Exchange* which are referred to. He was a member of the *Stock Exchange*, and according to its rules he obviously desired to act. These rules are put in evidence on the part of the Appellants. I do not propose to refer to them because they have very recently been under the notice of your Lordships. But it is quite evident from

H. L. (E.) 1877 TOMKINS v. SAFFERY.

those rules that they are rules which, dealing with the case of defaulters, of persons unable to meet their engagements, provide that those persons are to make known the facts of their case to their creditors upon the *Stock Exchange;* that their estate is to become subject to the intervention and the collection of the official assignees of the *Stock Exchange;* that the estate is to be administered in such a way as that there may be equality between all their creditors upon the *Stock Exchange,* and that as soon as that operation has been performed and the estate of the defaulter made available for the equal payment of his creditors upon the *Stock Exchange,* the question of whether he is to be re-admitted a member of the *Stock Exchange* or not is to be considered by a committee of the *Stock Exchange* upon certain principles, and after a certain investigation of his conduct has been gone through.

I wish, in order that I may not have to return to the subject, to say with regard to those rules, although your Lordships have not called upon the Respondents to state their view of this case, that, so far as my own opinion goes, I can see nothing whatever in those rules which is deserving of any animadversion whatever. They seem to me to be judicious and business-like rules. They do not seem to me to be rules contemplating or intending in any way to warp or strain, or in any way to elude or defeat the operation of the bankruptcy law of the country, but they are rules which, from the very nature of the case, are and must be subject to one infirmity, namely, that if they are to be effectual they must be applicable to the case of a person who not merely is a defaulter upon the *Stock Exchange,* but who has no creditors outside the *Stock Exchange:* because if such a person has creditors outside the *Stock Exchange,* the general law of the country will step in and must step in, and will give to those creditors rights which these rules cannot take away from them, and which I am bound to say these rules do not profess to attempt to take away from them. Therefore, although everything done in the domestic forum of the *Stock Exchange* under those rules may be done according to the rules, and may be most wholesome in its operation for the members of the *Stock Exchange,* still, what is done must be subject to the rights of those who are not amenable to

the jurisdiction of the *Stock Exchange*, and when those higher rights come into conflict with these rules, of course these rules must give way to those higher rights.

Now, my Lords, let us see what took place and what was done with reference to Mr. *Cooke* in pursuance of these rules of the *Stock Exchange*. A meeting was held, the meeting to which I am about to refer, and I agree with what has been said on behalf of the Appellants that the meeting was not a meeting of the *Stock Exchange* in its collective capacity, but was a meeting in the *Stock Exchange* of the creditors of *Cooke*, the bankrupt, and what was done was done by them and not by the *Stock Exchange* in its collective capacity. What was done was this, and here I take again the two narratives, the one of the bankrupt the other of the Appellants. The bankrupt says, "I attended with the books as requested, and the result was that the creditors decided that if I could get enough to make up 13*s.* 4*d.* in the pound, including the assets I shewed, (about £8000,) the *Stock Exchange* would be content; I had given nothing up to them at that time." Now, it appears that the bankrupt shewed assets to the amount of £8000, of which a sum of about £5000 was his balance at the *Bank of England*. The rest, as I understand it, was not ready money—was either debts due and owing to him or property of some other kind, and it is obvious that his *Stock Exchange* debts being £25,000, £8000 alone would not have paid the 13*s.* 4*d.* in the pound. Then he proceeds, "It was known that I had, or should have, £5000 or upwards at my bankers, which amount was included in my representation of assets at the meeting. The official assignees, Messrs. *Tomkins* and *Lyon*, requested me to give them a cheque for the balance, and I gave them next day, the 28th of April, a cheque for £5000 for distribution among my *Stock Exchange* creditors. This cheque was presented by *Lyon* (in company with my clerk) at the bank and duly paid."

The Appellant *Lyon* in his affidavit says that "upon the 28th day of April, 1876, a meeting of the creditors of the said *John Edward Cooke* was held on the *Stock Exchange*, at my offices, and at which meeting Mr. *Charles Branch*, of the firm of Messrs. *Foster, Braithwaite, & Co.*, was appointed chairman. That the debts then due by the said *John Edward Cooke* upon the *Stock*

H. L. (E.) 1877 TOMKINS v. SAFFERY.

Exchange amounted to the sum of £24,790. That upon the said 28th day of April, 1876, the said *John Edward Cooke* handed over for distribution, amongst his creditors upon the *Stock Exchange*, the sum of £5000, which money remained in the possession of myself and my co-official assignee until the 3rd of May." It was divided as a dividend on the 3rd of May.

This, my Lords, is the sum of £5000 in question, and the first point which arises upon this narrative is this, Was that which was done on the 27th or 28th of April a payment or a transfer of a specific sum of money, part of the estate of the bankrupt, or was it in point of fact a *cessio bonorum* by the bankrupt? If it was a *cessio bonorum* of his estate generally, it is unnecessary to consider any farther question—any question of fraudulent preference, or any question of the application of the 92nd section of the *Bankruptcy Act*, 1869. Being a general surrender of his estate, it would of itself be an act of bankruptcy, whatever the intent and purpose may have been, and would therefore be void. My Lords, I am bound to say that taking the narrative of the bankrupt, which appears to me not only not to be contradicted by the Appellants, but to be very strongly confirmed by the evidence of the Appellants, I cannot arrive, as a matter of fact, at any other conclusion than that there was, and that there was meant to be, on the part of the bankrupt, a general cession of his estate for the purpose of its being dealt with according to the rules of the *Stock Exchange*. I can give no other interpretation to these words: "I attended with the books as requested, and the result was that the creditors decided that if I could get enough to make up 13*s.* 4*d.* in the pound, including the assets I shewed (about £8000), the *Stock Exchange* would be content." He does not say that he repudiated that view, that he suggested any other view, that he withdrew himself from the jurisdiction of the domestic forum, and declined to have anything farther to say to their proceedings. He leaves this as that which was the result of what took place between himself and the *Stock Exchange* creditors, and the result, as I understand it, was this, that his assets, his £8000, were to go as far as they would towards the making up of 13*s.* 4*d.* in the pound, and that the 13*s.* 4*d.* was the sum named by the creditors as that which, if it could be made up by him from some one

quarter, would induce them to give him a release and discharge from all his debts.

It was attempted in argument to disconnect this from that which immediately follows—the payment of the £5000; but it appears to me that it is impossible to disconnect the two. What is stated afterwards is this: "The official assignees requested me to give them a cheque for the balance"; that is the balance of £5000 at the bank. No doubt they made that request, but why did they make that request? Because the bankrupt had put himself in a position by which it was his duty, according to the rules of the *Stock Exchange*, to make the official assignees of the *Stock Exchange* the administrators of his estate. Accordingly, turning to that which was the part of his estate immediately tangible and immediately realizable, it was, of course, the natural step for the official assignees to take, to request him to give them a cheque for that balance so immediately realizable. But I cannot look upon this as in the slightest degree analogous to a payment of £5000 disconnected from any other surrender of the estate, leaving him the possessor of the remainder of his estate, leaving him still master of £3000 to be applied to other creditors or for other purposes. The signing of the cheque for the £5000 was part and parcel of the entire cession of his property for the purpose of the rules of the *Stock Exchange*, and was merely implementing the provisions of those rules.

My Lords, the Appellant *Lyon* in his affidavit speaks of it in exactly the same way. He says that on the 28th of April a meeting was held, and the debts due by *Cooke* upon the *Stock Exchange* amounted to £24,790. On that day "*Cooke* handed over for distribution amongst his creditors upon the *Stock Exchange* the sum of £5000, which money remained in the possession of myself and my co-official assignee until the 3rd of May." He does not in any way controvert one word of the statements of the bankrupt in the affidavit which I have read. If, therefore, the matter stood there, I should be obliged, as forming a conclusion of fact, to come to the conclusion that there was here on the part of the bankrupt a cession of all the property he possessed for the purposes of his business.

Now, my Lords, I go to the other questions that have been

H. L. (E.) 1877 TOMKINS v. SAFFERY.

raised in the case, and I will take for a moment the view of the Appellants, that this as a matter of fact was not a cession of the whole of his property, but was a payment of £5000 under the circumstances which I have mentioned; and then I ask the question, how far can that payment be justified having regard to the provisions of the 92nd section of the Act of 1869? This section has to be looked at in two parts. There is first an enacting part, declaring what transfers of property shall be invalid, and there is then a saving, under which in the argument it was endeavoured to say that the Appellants might be held to come. With regard to the first part of the section, what it provides is this: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they became due, from his own moneys in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt."

My Lords, this payment, looking at it as a payment of £5000 simply, is clearly a payment which was made by a person unable to pay his debts as they became due, from his own moneys; about that there is no dispute. Then was it made with a view of giving the creditors to whom it was made a preference over the other creditors? Undoubtedly the debtor had other creditors at the time. The relations between himself and his father-in-law, to which an allusion is made in the affidavit I have read, turned out to be, and are now admitted to be, of a kind which made his father-in-law not a donor of money to him, but a creditor for money advanced to him. Therefore, looking, as your Lordships I think must look, upon Mr. *Cooke* as being possessed of the knowledge which he ought to have had, and which of course in one point of view he really had, Mr. *Cooke* must have been aware of the existence of at least one other large creditor, and he therefore must have been aware, looking to what his estate consisted of, that that which he was doing in paying the £5000 would have the effect of giving

the creditors upon the *Stock Exchange* a preference over his other creditors.

But then it was said, Did he make the payment with the view of giving that preference? That, in the argument of the Appellants, was said to depend upon this, Was the payment made under pressure? It was said, If it was made under pressure, it is the pressure you are to look to, it is the pressure you are to take as the *causa causans* of the payment, and not any intention of giving a preference to particular creditors. I will accept for this purpose that statement of the law, and accepting it, I am bound to say, and to say without the slightest hesitation, that in my opinion there was no pressure whatever here leading to the making of this payment. The creditors upon the *Stock Exchange* were not the originators of that which was done. The person who set the machinery in motion which was brought into active operation over this £5000 on the 28th of April was Mr. *Cooke* himself. It was he who (and I do not blame him for this), endeavouring to comply with the rules of the body to which he belonged, announced to that body that he was unable to fulfil his engagements, and being a defaulter, and making it known to his *Stock Exchange* creditors that he was a defaulter, thereupon received a summons to attend a meeting of those creditors; he was the person who set the machinery in motion. In attending that meeting of creditors, and laying before them a statement of the whole of his property, he again was complying with the rules of the *Stock Exchange*, and was virtually, according to those rules, making his creditors the persons to judge of the disposition of his property. And then, having thus put himself in the position in which, according to the rules of the body, it became his duty to surrender a sum of £5000, he signed a cheque for that amount, in consequence, no doubt, of the request of the official assignees; but that was a request which it was their duty to make by reason of the position in which *Cooke* had placed himself. Pressure, therefore, there was none. The act was done, the payment was made, as a part and parcel of that machinery which was set in motion by the bankrupt himself.

Therefore, looking at the first part of the 92nd section, I come without hesitation to the conclusion that here was a payment made by a person unable to meet his regular engagements, and was made

H. L. (E.) 1877 TOMKINS v. SAFFERY.

with a view of giving a preference to the *Stock Exchange* creditors over such other creditors as he had, he himself having the means of knowing, and therefore being a person who must be taken to have known, that he had other creditors.

But then, my Lords, it is said that the payment is to be protected under the latter words of the 92nd section. Those final words are these, "but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." My Lords, I am willing to take it that we have here a "payee" or payees "for valuable consideration," namely, pre-existing debts. But are they to be taken as payees "in good faith," within the meaning of this section? Of course I do not speak of good faith in a moral point of view. They may have believed the statement, and I am willing to take it that they did believe the statement of the bankrupt as to his having no other creditors. But are they payees in good faith according to the test which is laid down in this section, a test derived from the operation of the Bankruptcy Law? I take it that in order to give any meaning to the words "in good faith" at the end of this section, your Lordships must hold those words to apply to the matters which are mentioned in the earlier part of the section. If you find a person receiving a payment in complete ignorance of, or without any means of getting information with regard to, the matters mentioned in the earlier part of the section, he may be a payee in good faith. That was the case in the appeal that came before your Lordships' House of *Butcher* v. *Stead* (1). In that case there was a payment made to a person who was admitted not to have any knowledge of the circumstances of the person making the payment, and there was no suggestion that the person receiving the payment was aware that that payment would have interfered with, or could have interfered with, the rights of other creditors. But your Lordships have, in the present case, in the first place, this, that the persons who received the payment, the payees, were clearly aware that he who made the payment was a person unable to pay his debts, as they became due, from his own moneys, for he had told them so in the frankest and clearest way. Upon the application of that test, therefore, these payees must fail.

(1) Law Rep. 7 H. L. 839.

Well then, what as to their good faith, *quoad* the giving to themselves, the *Stock Exchange* creditors, a preference over other creditors? Now, my Lords, they are in this position as to that—they knew the amount of the bankrupt's assets, they knew the amount of their own debts, they knew therefore that if there was another creditor undoubtedly they must be receiving a preference over that other creditor. And upon the all-important fact whether there was another creditor or not, they had this farther information, that there was a person with whom the bankrupt had had pecuniary dealings to a considerable amount, which dealings might take the form either of debt or of bounty not amounting to debt. That they knew, for upon that they had asked questions. And my Lords, upon all this they were satisfied to take the word of the bankrupt himself alone, the person who of all others upon a matter of this kind would be their most untrustworthy informant. If they had been disposed, in good faith, really to ascertain what was the truth upon this matter, all they had to do was to ask the person who could have given them the information, namely, Mr. *Mackenzie* himself. They asked no question of him, or of any other person representing him; they took the word of the bankrupt, and upon that they trusted; and in that view how can they be in any higher position than the bankrupt himself? Whatever notice or knowledge he has, they must be held to have. They did not provide themselves as they might have done with independent information; they rested their title upon the truth, or the untruth, of the assertion made to them by the bankrupt, and upon that truth or untruth they must stand or fall. If the statement had been a true one, the transaction might have been maintained, but not being a true one, it cannot, in my opinion, be maintained.

Now, my Lords, I think it due to the Appellants and those whom they represent, to say that I have no reason to doubt that in point of fact they were willing to receive the statement as true—they had no knowledge that it was otherwise than true, but they had the means of knowledge, and legally by that, in my opinion, they must be affected. I desire, however, to impute to these gentlemen no departure from principles of rectitude or morality, and I regret that by what I think was a misapprehension of some expressions which fell from the Court below some feeling of dis-

H. L. (E.) 1877 TOMKINS v. SAFFERY.

satisfaction has arisen on the part of the Appellants, as if something had been said in the Court below which was intended to impute, to those who were represented by the Appellants, a departure from correct and honourable action. My Lords, I read the statements which were made, and the expressions which were used by the learned Lord Justice who delivered the judgment of the Court below, as referring not to the facts of the case, but rather to certain arguments which perhaps with too great confidence had been placed before him as to the law applicable to the case. I repeat, I see nothing whatever in what was done here, upon the *Stock Exchange*, which was not perfectly consistent with honourable feeling and honourable conduct, but I repeat also, that there was, underlying the whole of what was done, the one infirmity, namely, the question of whether there was an outside creditor who would not be bound by what was done. There was, as it turned out, at least one outside creditor, to a large amount; his rights cannot be affected, and his rights having led to the bankruptcy of *Cooke*, in my opinion it became necessary and right that the sum of £5000 which had been handed over to the present Appellants, should be brought back again for the purpose of the administration of the bankruptcy.

My Lords, I think this appeal ought to fail, and that it should be dismissed with costs, and I move your Lordships accordingly.

LORD O'HAGAN:—

My Lords, I am of the same opinion, and I too feel bound to say that I see nothing in the case which impeaches the integrity, in purpose or in action, of the *Stock Exchange*. This appeal appears to me to have been prosecuted very much under the influence of irritated feeling; but the words that produced that feeling may be accounted for in the way suggested by my noble and learned friend, without an imputation of impropriety either as to the rules of the body or the proceedings of its members. I think there is no ground whatever for such an imputation; if they believed the statements made by the defaulter they were fully justified in what they did; they were only wrong because what he had stated as facts were not facts, and so they were misled.

As to the appeal I cannot doubt, notwithstanding the ability

with which it has been sustained, that it must be dismissed with costs, whether we regard the salutary principles which have been so long enforced by wise and eminent Judges for the protection of the most important interests of the mercantile community, or the terms of the statute, which have removed many difficulties heretofore embarrassing the application of those principles to such a case as this.

The facts are undisputed. They fully appear in the affidavit of the bankrupt. The arrangement on which the Appellant relies took place on the 27th of April. The act of bankruptcy was on the 13th of May, but on the 26th of April the bankrupt had formally declared his insolvency. The persons who insist on the benefit of the arrangement are not all his creditors, but a selected portion of them; and the payment which they seek to have validated, gave them a material advantage, to the detriment of those who did not belong to that selected portion. In these circumstances two questions have been raised and argued. First, was there a *cessio bonorum?* And, secondly, are the Appellants entitled to have their separate rights maintained under the provisions of the statute? To the first question I think your Lordships should answer in the affirmative, and to the second in the negative.

If it were necessary to support the judgment of the Court of Appeal, I should have no hesitation in holding with Lord Justice *James* that there was a *cessio bonorum.* The bankrupt was a member of the *Stock Exchange,* and, as such, had bound himself by the rules which are in evidence. According to those rules when he became unable to fulfil his engagements, and announced the fact to the secretary, the official assignees were at once brought into action, and it was their duty to take instant proceedings for seizing his assets and securing his creditors. They were authorized to obtain from him his original books of account, a statement of the sums owing to and by him; and he was bound to attend meetings of creditors, and to give every information and assistance to the official assignees, "in conformity with the rules, regulations, and usages of the *Stock Exchange.*" So that the immediate effect of the notice of insolvency was to take from the insolvent all control over his own property, and to transfer it altogether to the official assignees. And, this having been accomplished, the 167th

H. L (E.) 1877 TOMKINS v. SAFFERY.

rule provides that "the assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

In the present case, these rules were acted on with promptitude and strictness; and if there had been no creditors except members of the *Stock Exchange*, there would have been no possible objection to their enforcement of obligations voluntarily undertaken by the insolvent, on which his own official notice had invited them to insist. It was vainly urged that there was not a complete parting with the property, inasmuch as the insolvent had assets amounting to some £8000, and the creditors requested him, whilst they claimed 13*s.* 4*d.* in the pound on their entire debts, to give the assignees a cheque for £5000 which was at his bankers. Therefore it was said that they did not get, and he did not give, all that belonged to him to meet his liabilities. This is plainly fallacious. The *Stock Exchange* creditors demanded from him more than all he had; but they took, on account, this balance at the bankers, leaving him afterwards to satisfy fully his engagements as best he could. He had assured them, erroneously, that to them only he was indebted; and it was understood on all hands that they must be losers, after his whole estate was realized, to the extent of one third of their demands. In their condition of knowledge, their arrangement was perfectly legitimate and just, but it took from the debtor everything he possessed. The notice of the insolvent was spontaneous; given on no pressure; procured by no request; and involving the surrender of all his assets for the benefit of the specific class of creditors to whom it was addressed. The moment it was received by the secretary, the *cessio bonorum* appears to me to have been complete. It brought into operation instantaneously the whole machinery of the rules of the *Stock Exchange*, and entitled the assignees to realize the entire estate of the debtor. He could not more effectually, with a view to bankruptcy, have yielded up that estate if he had assigned every portion of it by a formal conveyance.

For these reasons, I am of opinion, with the Lord Chancellor and Lord Justice *James*, that there was clearly in this case a *cessio bonorum* for the benefit of a limited class of creditors when insolvency had been declared and bankruptcy was imminent, and, this

being so, no farther argument is needful to defeat the Appellants' claim to exclusive advantages unshared by the general creditors of the bankrupt.

Then, looking to the statute, I think the matter is equally clear. The bankrupt was in an insolvent condition. He was indebted to two classes of persons—the members of the *Stock Exchange* and his general creditors, mainly his father-in-law, whose peculiar relations with him do not require to be noticed, as they do not, in my view, affect the argument. And in these circumstances he entered into an arrangement, which, however it may be regarded, was clearly made in the terms of the statute "with a view of giving preference" as against one class of creditors in favour of others. The facts of the case could scarcely be represented in more precise and fitting words. A preference was given as soon as, according to the rules of the *Stock Exchange*, the declaration of insolvency authorized the official assignees, for the exclusive benefit of creditors who were members of it, to seize upon the greater portion of the assets by impounding the balance at the *Bank of England*. The practical effect of the notice is thus described by the bankrupt in the tenth paragraph of his affidavit: "Immediately on my default being announced in the house, the usual official notice thereof was sent by the official assignees to my bankers, the *Bank of England*, which, I am informed, practically amounted to a *distringas* being placed on my balance." I called Mr. *Herschell's* attention to this passage, and he contended that the notice had not the legal effect of a *distringas*. But however that may have been, the paragraph plainly shews the understanding and intention of the parties to have been that the *Stock Exchange* creditors should be primarily and exclusively secured. And when we find, from the same affidavit, that the notice to the bank was followed by the demand for the bankrupt's books and for the cheque for £5000, which was only paid on presentation by the assignees in company with the bankrupt's clerk—whereupon, as he says, "the *distringas* was practically removed," we can have no doubt that the "preference" was not only intended, but very completely carried into effect.

Considering all this, I think that the case comes clearly within the operation of the first part of the 92nd section of the statute;

H. L. (E.) 1877 TOMKINS v. SAFFERY.

and that all the suggestions we have heard as to the want of spontaneity, the existence of pressure, and the partial character of the payment made by the bankrupt, should be, on the admitted facts, disregarded by your Lordships. Accepting the cheque for £5000, the *Stock Exchange* creditors did not abandon or postpone their claim to the rest of the bankrupt's assets; and the operation of his notice, as creating a *cessio bonorum*, was not affected by the effort of the assignees to lay hold immediately on all they could.

On the second point, which has been raised with reference to the terms of the concluding part of the 92nd section, it has been dealt with so conclusively by my noble and learned friend on the woolsack that I do not deem myself justified in adding a single observation upon it. On the whole, I concur with him that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am also of opinion that this appeal should be dismissed.

I think that the fact that the bankrupt, Mr. *Cooke*, became a member of the *Stock Exchange* under the *Stock Exchange* rules shews that he at that time entered into, not an agreement enforceable in law, but an honorary agreement that he would act in his dealings upon the *Stock Exchange* according to those rules as long as he continued to be a member. The committee of the *Stock Exchange* might dismiss him if he did not act according to those rules, and by the very essence of the rules he ceased to be a member the moment he became a defaulter. He had then the knowledge of his being under an honorary obligation, and the knowledge that if he did not act as they thought right and proper, it would be a question whether he should ever be re-admitted to the *Stock Exchange*:—[His Lordship stated the substance of several of the rules.] Observe that by the 167th rule it is provided that "the assignees shall collect and pay the assets to the credit of their joint account at a banker's."

A good deal has been said on a matter which becomes important here from one point of view, namely, what is meant by this rule when it says "the assets." I confess, my Lords, my own impression

is that it means, not only that the official assignees shall collect the assets, but that a defaulting member is bound by the agreement which he made when he entered the *Stock Exchange* to give them the assets; that is to say, the whole of his available property is to be handed over to them. I confess that is the view that I take of its meaning, and that is my impression of what he was bound to do. I quite agree that, in practice, no body such as the members of the *Stock Exchange*, consisting of mercantile men, would follow that up to the literal extent. But the effect of the rule is this: it is meant that a member of the *Stock Exchange* shall give over what would be substantially the whole of his property to these official assignees; that is how I should certainly construe this rule. It is in practice far less likely to work unjustly than people might suppose, because, as the members of the *Stock Exchange* are strictly forbidden by the rules to enter into any other transactions than their *Stock Exchange* transactions, they seldom have creditors to any great amount, except people who have lent them money without security, and people would seldom have lent the money without security unless they were relatives or friends, which appears to have been the case here. We know that the great creditor here was a near relative of the bankrupt, who had advanced money to him in that way. Therefore it is not, to my mind, surprising that this rule has been so worked, and that although it has been in existence for a great many years, yet this is the first time that it has become the subject of discussion in a Court of Law.

Nevertheless whether it means the whole assets, which I certainly think it does, or whether it means only such portions of the assets as they could honourably obtain, which is the contention of the Appellants, either way it means some assets. Now what are they to do with them? They are to distribute them amongst the creditors, and as to creditors the 153rd rule does not recognise any payment or claim on a defaulter's account that does not arise from a *Stock Exchange* transaction. Consequently those assets which, according to this honorary agreement, the defaulter was bound to hand over to the official assignees are to be distributed solely and exclusively to those creditors whose claims arise out of *Stock Exchange* transactions. It is impossible, as it seems to me, not to see that if that be done, these assets, to whatever extent

H. L. (E.) 1877 TOMKINS v. SAFFERY.

they go, whether they be the whole of the assets, or a portion of the assets, are to be so distributed as to give a preference to creditors arising out of *Stock Exchange* transactions, over creditors arising out of other than *Stock Exchange* transactions. I do not know that any words can make it clearer than the rule itself does; it says they are to distribute the assets, and they are to recognise no claim except one that arises out of a *Stock Exchange* transaction. That would clearly be a preference.

Now comes the question, is this proper, is it good according to law, when a subsequent bankruptcy has occurred within the specified time after the payment has thus been made? If it were the whole property which had been transferred, if every portion of it had been given by Mr. *Cooke*, it would have been an act of bankruptcy as being a conveyance of his whole property, which carries with it the necessary consequence of delaying and defrauding his creditors. The whole property is not transferred; a portion of the property is transferred. Whether it was transferred as being a part of the whole, and as being intended to be followed up and liable to be followed up by the transfer of the remainder, or whether as a separate thing, is a question upon which there has been some argument. If it was as being a part of the whole I cannot help thinking that when it is intended to transfer the whole, and when the transfer of that whole would be an act of bankruptcy as necessarily delaying and defrauding the creditors, then the transfer of a part in performance of the contract must necessarily be an act of bankruptcy also. But while I cannot help thinking that that would be so, I do not know that it is necessary to decide that question in the present case. The facts as to whether it was intended to be a part of the whole and followed by the remainder or not are perhaps not quite so clear as they might be, but it is not necessary to decide that point, as I am clearly of opinion that the appeal must equally be dismissed with costs, if it appears that this was intended to be the only part of the assets which was to be handed over for the benefit of the *Stock Exchange* creditors.

Now, my Lords, I think the question of fact is material, but the point turns upon the effect of the 92nd section of the *Bankruptcy Act*. That Act very materially altered the old Bankruptcy Law,

but to a great extent the old Bankruptcy Law remains the same, and it must be considered in construing this Act. By this section it is enacted:—[His Lordship read it.]

It was argued very ably by Mr. *Herschell*, and I think to some extent my mind goes with his argument, that when this section speaks of a payment with a view to give a preference over other creditors, we must see whether it was a payment made under such circumstances as would under the old Bankruptcy Law have been considered a preference, and a fraud in a bankruptcy. Now I think you must say that it is not with a view to give an undue preference, if a man makes a payment to a creditor in the ordinary course of business. Supposing a bankrupt, although knowing that he is very likely to stop payment next week, struggles on and makes a payment without being particularly asked; supposing he pays his debts and sends his money to meet his bills on those days on which they become due, and does other things so as to keep himself alive and in good credit for the time; that would not have been undue preference I think, because those payments were not made "in favour of" certain creditors as against others, but were made in the hope—a desperate hope perhaps—that if he were able to keep himself alive something might turn up in his favour. Nor do I think it would be an undue or a fraudulent preference if there was a demand upon him, and a yielding to that demand, by making a payment which might not otherwise have been made so soon.

But while I agree with that, the point where I differ from Mr. *Herschell's* argument is this: I think that that is not at all applicable to this case; I think that as a matter of fact it is impossible to say that Mr. *Cooke*, the bankrupt, paid this £5000 on account of any ordinary pressure of the kind I have mentioned, or in the ordinary course of business, or anything of the kind. It seems to me to be clear as a matter of fact that he paid this money to the official assignees, because when he became a member of the *Stock Exchange* he had entered into an honorary engagement that he would, in the event of his becoming a defaulter, pay the money to them which they were to distribute to his *Stock Exchange* creditors, who were to be preferred to the others. I do not think that there is anything morally dishonest in that, nor

H. L. (E.) 1877 TOMKINS v. SAFFERY.

anything which in the great majority of cases would produce hardship. Nevertheless, the fact that it is voluntarily paid with the view to give certain creditors, namely, the *Stock Exchange* creditors, an undue preference, is one which I cannot bring myself to doubt. I think, as I have already said, that the fact was, that beforehand, whilst he was yet solvent, he had entered into an agreement in which he said, In the event of my becoming insolvent and being unable to pay my debts I will give you what assets I have, and he did so.

Now, my Lords, there remains only one other point to be considered, and that has reference to the proviso at the end of the 92nd section. The earlier part of the section declares that if a payment is made with a view of giving certain creditors a preference, and if the person making it becomes bankrupt within three months afterwards, it shall be void. Then the proviso is: "But this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." Now comes the question, Are those gentlemen on the *Stock Exchange*, who are certainly creditors and payees, payees "in good faith and for valuable consideration"? As to "valuable consideration," Yes, we must, I suppose, take it that they are so; but "in good faith"? What does that phrase mean in the section? Now it must be observed that the Appellants, the official assignees, knew that this person, Mr. *Cooke*, was unable to pay his debts out of his own means. They were aware that it was within the Act in that respect; they were aware that those moneys were given to them for the very purpose of preferring the creditors arising out of transactions on the *Stock Exchange* to the general creditors, if there were any; and they were aware, therefore, that if there were any general creditors, which they would expect and suppose in the ordinary course of things that there would be, although probably the amount of their debts would be small. In point of fact there do appear to have been some few debts here not arising out of *Stock Exchange* transactions, Mr. *Mackenzie's* being the great one. I say they were aware that if there were any such, this would be giving the *Stock Exchange* creditors a preference over the others, and consequently they were aware of the greater part of the circumstances and elements which would, in fact, bring this case

within the operation of the statute. They had no express notice or knowledge of the fact that there was any other creditor, but they seem to have had some suspicion about this Mr. *Mackenzie*, and they asked a question about him, and Mr. *Cooke*, the man who has since become a bankrupt, told them that the money was not a debt, but a gift. If it was a gift, of course it would not be a debt at all. It is not stated in the affidavits that they believed that altogether. Perhaps I may be supposed to be hypercritical in saying that it may be doubtful whether they believed it. It is not stated in the affidavit that it made the least difference in their conduct, and I do not believe that it did make any. If he had said, "I have other creditors out of the house for other transactions," I believe they would have said, "Give us the £5000" all the same. They do not by any means say they would not, and I confess I think that is material for our consideration in coming to a conclusion on the matter. It comes round to this, that I think (I am stating it in my own words, but it is very nearly what the Lord Chancellor has already said) that when they knew that the man was insolvent and unable to pay his debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it; they took their chance. If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was necessary for them to know, and I think they took their chance, and they must take the consequences.

Now, my Lords, having said that much, I think I have brought the case round to the conclusion that the appeal should be dismissed with costs. I will only add this farther, that I do not think there is any attempt on the part of the *Stock Exchange* to break through the general rules of law by this rule of theirs, nor, as they work it, would there be any hardship in it; but I do not think it is in the power of the *Stock Exchange* or of any body else, to agree that a man who is in a solvent state, shall beforehand

H. L. (E.) 1877 TOMKINS v. SAFFERY.

agree, that when he is in an insolvent state, he shall hand over any portion of his moneys with a view to preferring one set of creditors over any other set. I think that that is expressly forbidden by the 92nd section of the statute, and it seems to me that it was with that view that the £5000 were handed over. Consequently, my Lords, I am of opinion that the decision of the Court below was right, and that this appeal should be dismissed with costs.

LORD GORDON:—

My Lords, I entirely agree with the rest of your Lordships with reference to the disposal of this case. The observations of the Lord Justice in the Court of Appeal were probably made more in consequence of the line of argument which was submitted to him than with a view to suggest the idea that the members of the *Stock Exchange* intended to get rid of the binding effect of the equitable laws of bankruptcy, which must continue to be binding upon them. At the same time one cannot help seeing that they have probably adopted a very wise and expedient rule in making such regulations as have been the subject of discussion to day, because all the members of the *Stock Exchange* are engaged in transactions very much of the same character—they know what one another's transactions are, and it is of great importance that there should be a code drawn up, not of course binding upon the public, but for the purpose of regulating their rights *inter se*, and with a view to promote equality in cases of default amongst themselves. But nothing could be done by them which would have the effect of infringing upon the common law, or the law of bankruptcy as administered in Courts of Equity, as was suggested by some of the opinions delivered in the Court below.

The judgment must be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 16th November, 1877.

Solicitors for the Appellants: *Lewis & Lewis.*
Solicitors for the Respondent: *Lawrance, Plews, & Baker.*

[HOUSE OF LORDS.]

ROBERT HOGARTH PATTERSON (PAUPER) . APPELLANT;

AND

THE DIRECTORS, &c., OF THE GAS LIGHT AND COKE COMPANY . . . . . } RESPONDENTS.

H. L. (E.)
1877
Dec. 13.

Patent—Knowledge of Public Officers—Public Property.

If an invention becomes (without fraud) known to the public, no subsequent patent can be granted for it. It is not necessary that it should have been used by the public, as well as known to the public.

Where a Report, on a particular subject, is made to a public office, by referees specially appointed under an Act of Parliament to inquire into and report on such subject, the knowledge contained in that Report being fully possessed by the referees, it must, from that moment, be treated as absolutely the property of the public and as being publicly known, although, in fact, the Report was not formally published till some days afterwards.

If the knowledge thus obtained in the course of the discharge of his duty by one referee, was, by his communication of it to his colleagues, possessed by all the referees, the moment they became possessed of it, it became public property, and they had no power whatever to agree among themselves to treat its communication as confidential, nor would their doing so enable one of their number to take out a patent in regard to it.

THIS was an appeal against a decision of the Lords Justices of Appeal reversing a decision of Vice-Chancellor *Bacon* (1).

The Appellant had been appointed under the *City of London Gas Act*, 1868 (31 & 32 Vict. c. cxxv.), one of three referees who were to inquire into the subject of the purification of gas, and to report to the Board of Trade the results of their inquiries. They drew up a report (one portion of which was alleged to have been confidentially communicated by the Appellant to his co-referees), which was fully prepared on the 31st of January, 1872, but was not at that time presented to the Board of Trade. The Appellant applied for a patent for "Improvements in the Purification of Coal Gas," the alleged novelty or "improvement" in respect of which the patent was claimed being one of the matters contained in the official report—the one which he alleged himself to have commu-

(1) 2 Ch. D. 812, where the details of the alleged invention are fully set out.

H. L. (E.) 1877 PATTERSON v. GAS LIGHT AND COKE COMPANY.

nicated to his co-referees. His provisional specification was dated on the 9th of March. The report was sent to the Board of Trade on the 27th of March, and at once made public. The patent founded on the specification of the 9th of March was formally sealed on the 28th of May. The Appellant complained that the Respondents had infringed his patent. They denied the alleged novelty (which matter was fully discussed in the Court below), and also his title to take out a patent in respect of it. Vice-Chancellor *Bacon* had made a decree in his favour, which decree was reversed in the Court of Appeal. The present appeal was then brought.

The Appellant conducted his case in person.

The hearing was adjourned.

Mr. *Southgate*, Q.C, Sir *H. James*, Q.C., Mr. *Davey*, Q.C., and Mr. *Stirling*, appeared for the Respondents, but were not called on to address the House.

LORD BLACKBURN :—

My Lords, in this case the Appellant, on the 9th of March, 1872, petitioned for a patent for "Improvements in the Purification of Coal Gas," and on that day left his provisional specification. The letters patent, dated of that day, were sealed on the 28th of May. On the 9th of September, 1872, he filed a complete specification, in which he made five claims, the first and second relating to purifying gas by means of lime in the state chemically called sulphide of calcium. The third, fourth, and fifth claims related to processes in which lime was not employed.

It was not denied that if the Plaintiff's patent was good, the Defendants had done what would amount to an infringement of his second claim. But it was alleged by the Defendants that each one of the Plaintiff's five claims was a claim to what was not the subject of a valid patent, on the ground that the subject-matter of each of those claims was, at the time the patent bore date, already known ; and if this was made out on the evidence as to any one of the five, then (there having been no disclaimer) the whole patent was void in law. The consideration of each of those five objections requires it to be determined what the construction of the

specification is, and what is the fact as proved by the evidence as to what was known before the date of the letters patent, viz., the 9th of March, 1872.

The Vice-Chancellor came to the conclusion that no one of these five objections was established, either in fact or law. The Court of Appeal came to the conclusion that each one of the five objections (any one of which would be fatal) was made out both in fact and in law.

But besides those five objections, the consideration of each of which requires to some extent the determination of disputed facts, there was another on which the facts are undisputed, and which involves only a question of law.

The Appellant, Mr. *Patterson*, was one of the three gas referees appointed by the Board of Trade under the *City of London Gas Act*, 1868 (31 & 32 Vict. c. cxxv.) Those gas referees had, on the 31st of January, 1872 (previous to the date of the Plaintiff's patent, which is the 9th of March, 1872), drawn up a report to be presented to the Board of Trade. This report was then agreed to by all three, and all that was in it must then have been known to both the other two referees as completely as to the Appellant. The report, though then complete, was not sent to the Board of Trade till the 26th of March, nor received by the Board of Trade till the 27th of March. It was, without any delay, circulated by the Board of Trade amongst the gas companies and those interested, and was the subject of much discussion, and its contents from that time were known to all concerned in gas.

It was not disputed that part, at least, of what is claimed as a novelty in the Appellant's specification of the 9th of September, 1872, is also to be found in this report. The Appellant, in his amended bill of complaint, paragraph 37, says: "On the 26th day of March, 1872, a report to the Lords of the Committee of the Privy Council for Trade was forwarded to the Board of Trade by the Metropolitan Gas Referees, of whom the Plaintiff was one, on 'The Sulphur Purification at the *Beckton Gas Works*,' in which the defects in the purifying processes and apparatus at the *Beckton Works* were pointed out, and also wherein one of the methods of employing the Plaintiff's invention described in the aforesaid specification of the Plaintiff, *videlicet*, that relating to the working of

H. L. (E.) 1877

PATTERSON v. GAS LIGHT AND COKE COMPANY.

lime purifiers, was, with the Plaintiff's assent, clearly indicated or described."

The Vice-Chancellor seems to treat this as merely a personal objection to the Appellant. The Judges of Appeal, in their judgment, though stating very truly that (on their view of the evidence as to the other objections) it was not necessary for the determination of the suit to pronounce any final decision on this point, shew very clearly that this is not the real nature of the objection. They say (1), "It is to be borne in mind that the report, then made, belonged absolutely to the State. Every fact and figure in it had been ascertained and obtained at the public expense. Every hour of every referee, and of the secretary employed in the production of it, was public time. It was, of course, printed at the public cost. The withholding or wilful delaying of it was a plain breach of public duty, and it is difficult to see how the Plaintiff can be in a better position than if he and his colleagues had done their duty, and duly presented their report as soon as it was completed. The consideration for every patent is the communication of useful information to the public. What consideration is there when the information was already the property of the State?"

My Lords, the Appellant has unfortunately been reduced to poverty, and was obliged at your Lordships' Bar to conduct his case in person. It could not be expected that he should deal with the questions of law as a trained lawyer would, and though he probably was at least as thoroughly acquainted with the facts, and at least as capable of understanding the evidence given as to the processes put in use by others before the patent, as any counsel whom he could have employed, he could not be expected to bring them so well and pointedly before your Lordships' House as a trained counsel would have done. Great allowance should be made, and I am sure was made, by each of the noble and learned Lords who heard his argument, for these disadvantages. After hearing all that he had to say, on the evidence which had convinced the Court of Appeal that the first and second claims in his specification were not new, and on the question as to the effect of the making of the report before the date of the patent, your Lord-

(1) 2 Ch. D. at p. 833.

ships were disposed to think that the judgment of the Court of Appeal was on those grounds alone to be supported, and you adjourned the discussion of the case without hearing the Appellant upon the objections arising on the other three claims, and without hearing the Respondents' counsel in answer to the argument as far as it had gone, which would be unnecessary if, on consideration, your Lordships finally held the same opinion as you were then inclined to hold. If any doubt should arise in the minds of your Lordships, the argument was to be resumed.

My Lords, after carefully reading the Appellant's case, (in the preparation of which he had the assistance of counsel,) as well as considering all that the Appellant urged in person on the argument, and also the judgment of the Vice-Chancellor in his favour, I have come to the conclusion that the judgment of the Court of Appeal should be affirmed, both on the two grounds, which are included in those on which the Court based its judgment, that the first two claims in the specification are proved by the evidence to have been known to the public, and to have been used in public before the date of the Plaintiff's patent; and also on the ground, mentioned in the judgment, though it was not formally made the subject of a final determination, that the whole of what was contained in the report was public property, before the report was sent in to the Board of Trade, and consequently that from the time when the report was framed, *i.e.*, the 31st of January, 1872, at latest, there was no consideration for the patent, as the subject of it had ceased to be a *new* manufacture before the date of the patent. My Lords, I think it more convenient to deal with this last question first. In order to make it intelligible, it is necessary to state the position of the gas referees.

My Lords, it seems to me clear that the duty of the referees under the Act was to ascertain how far the gas could be practically purified by each company. If they found that gas containing not more than a certain limited amount of impurity could be practically produced by any means, they were to prescribe the maximum amount accordingly, and they were (by obvious implication, though it is not expressly enacted) to make public how this degree of purity could practically be obtained. It was not material

H. L. (E.) 1877 PATTERSON v. GAS LIGHT AND COKE COMPANY.

to them to inquire whether these were means previously known, which the companies had failed to make use of from parsimony, negligence, or ignorance; or whether there was some new idea which had been developed during the course of their inquiries, which made those old means practically available, when before they were not. They were not at all required to distinguish new from old. In all these respects the report was quite different from a specification. But as soon as they became aware that the gas could be practically brought to this degree of purity, their duty was to fix the maximum accordingly, and to make known to the public the means by which this could practically be done.

My Lords, the report of the 31st of January, 1872, is drawn up as it ought to have been. It shews that by some means, there explained, purity to a great extent could practically be obtained; it makes no attempt to shew how much of this was previously known, though neglected; and it nowhere states that any part of what was now disclosed was invented by one of their own body. The object of the specification of the 9th of September, 1872, was quite different. It was required to describe and ascertain the nature of the Appellant's invention, and in what manner it was to be performed.

The consideration for a patent is the communication to the public of a process that is new. In *Hindmarch* on Patents (1) it is laid down that "If the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true or first inventor himself, or any other person, for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give." This is, in my opinion, a correct statement of the law.

It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated:

(1) 1st Ed. (1846) p. 33.

Stead v. *Williams* (1); or in a specification duly inrolled: *Bush* v. *Fox* (2); *Betts* v. *Menzies* (3); it avoids the patent, though it is not shewn that it ever was actually put in use. It is true that the latter case establishes that "an antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless you have ascertained that the antecedent specification discloses a practicable mode of producing the result which is the effect of the subsequent discovery": *per* Lord *Westbury*, C. (4).

But all difficulty on that score is, in this case, removed by the statement in the thirty-seventh paragraph of the bill of complaint already cited. If the date of the patent had been after the circulation of the report amongst the gas companies, instead of being, as it was, a few weeks earlier, the case would, it seems to me, have been quite unarguable. The date of the patent was, however, before the contents of the report were known to the gas companies, though several weeks after they were known to the whole of the referees and their secretary; and, as I have already pointed out, from the moment the referees became aware of what was in the report, it became the property of the public, and they were bound to make it known. The Appellant, indeed, contends that he made it known to the referees only confidentially. I do not pause to inquire whether this was the fact or not, for I think it immaterial. I do not mean to throw any doubt on the doctrine in *Morgan* v. *Seaward* (5), that a disclosure to assistants or partners of an invention whilst it is being perfected, under an obligation to keep it secret till the patent is taken out, is not a disclosure to the public, for such persons could not make the invention known without a breach of duty. But, in the present case, the disclosure was to paid public officers, who could not keep it secret without a breach of duty. They were bound to make it known, and even if they, in breach of their duty, kept it back, the invention was not the less the property of the public from the time the referees knew it, which was at least as early as the date of the report. I have only farther to observe that this view of the case does not appear to have been brought to the notice of the Vice-

(1) 7 M. & G. 818, 842.
(2) 5 H. L. C. 707.
(3) 10 H. L. C. 117.
(4) Ibid. at p. 154.
(5) 2 M. & W. 544.

H. L. (E.) 1877 PATTERSON v. GAS LIGHT AND COKE COMPANY.

Chancellor. He treats the objection as if it was one personal to the Appellant, on the ground that he made the invention at the expense of the public, and from information obtained by him in his public capacity. My Lords, if the Attorney-General had applied to have it declared that the patent on this ground belonged in equity to the Crown, and claimed either to have it rescinded or assigned to a trustee for the Crown, it would have been necessary to consider how far this was made out in fact or good in law. As it is, all that is necessary to say is that this point is not raised.

My Lords, I have also come to the conclusion that it is proved that, at least that portion of what the Appellant claims as a new invention, which is described in the part of his specification, from the words "I propose to employ these processes as follows," to the words "converted into sulphides of calcium," had been done at the works at *Bow*:—[His Lordship read passages from the affidavit to establish this statement.]

The Appellant appears, from what he says in his specification, to be of opinion that, if he first discovered the theory and reason of that which had before been done empirically, he is entitled to a patent. I need hardly point out that this is a mistake; if by reason of knowing the theory he is enabled to make some improvements he may take out a patent for those improvements, but he cannot take out a patent to prevent others from using what they had used before, though only empirically. But, in fact, Dr. *Letheby* had, in a lecture delivered by him in 1870, and printed at the time, stated what was then done at the *Bow Works* (not then belonging to the Defendants), and not only stated what was then done, but also the chemical theory on which it was done; and speaking with reference to those works at *Bow* where dry lime was employed, which (as he had before stated) was, by the operation of the sulphuretted hydrogen in the crude gas, converted into sulphide of calcium, he, in that lecture, published and printed in 1870, says: "In the case of sulphide of calcium it should be permitted to act for some time after the lime has become foul, for it is in this condition that it is most effective, and a lime purifier should not be changed until the sulphuretted hydrogen of the foul lime is largely displaced by the carbonic acid of the raw gas."

My Lords, I will not occupy more time by pointing out in detail what seems to me obvious, that the first two claims in the specification would, if good, enable the patentee to prevent any one from doing now what *Harris* and *Carpenter* say they did in 1867, and what Dr. *Letheby* in 1870, in a published document, said they were then doing, and in which document he explained how it produced the effect which it did.

There is a great deal of evidence on other user, especially at the *Beckton Works* in February, 1872, but as what I have before referred to is in my opinion quite sufficient to shew that the Appellant's invention as described and claimed in his specification was not new, I refrain from examining it.

It seems to me that for each of these reasons the judgment below should be affirmed, and the appeal dismissed. In an ordinary case the appeal would be dismissed with costs, but in this case the Appellant sues *in formâ pauperis*, and consequently the appeal will not be dismissed with costs, but simply dismissed.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I had prepared, in this case, some observations which I proposed to make to your Lordships upon the questions raised by this appeal, and I had intended to submit to your Lordships a motion exactly the same as that which my noble and learned friend has proposed; but having had the advantage of seeing and considering the reasons which he has given, I have found that all that I had desired to express has been so fully and so clearly expressed by my noble and learned friend, that, with one exception, I do not propose to do more than say that I entirely concur in the opinion which he has stated. The single exception I must make is this. I do desire to say that I entertain the very strongest opinion that looking to the position of the Appellant in this case as one of the referees under the Act of Parliament, I hold that it would be perfectly impossible that there should have been inserted in a report of the referees prepared and put in type and dated on the 31st of January, 1872, a statement of a process practically adapted for the purification of gas, without the public becoming the absolute proprietors of the statement, and of any novelty, if there was novelty, in the invention which was so described.

H. L. (E.) 1877 PATTERSON v. GAS LIGHT AND COKE COMPANY.

I observe that in this particular case one of the other referees has made an affidavit. I have not observed any reason given why the third referee has not given any evidence, but the referee who has made an affidavit, Mr. *Pole*, stated that the communication by the Appellant to the referees was confidential, and that it was their "understanding" (that is the word used by him), that the Appellant was to be at liberty to take out a patent for it. My Lords, I should not be able, if the question of fact were material, to accept that statement, made in that way by one of the referees, as proof of the fact that there had been a confidential communication of this process, or that there had been any agreement or anything distinctly said between the parties, as to the right of the Appellant subsequently to take out a patent. But however the question of fact may be, whether anything was said between the parties or not, I hold in the strongest way that it would have been entirely *ultra vires* of the referees, while accepting a statement which was to be introduced into their report, and agreeing upon the fact that the process, described in their report, would be a useful process for the purpose of purifying gas, to have coupled that with any agreement on their part, that the statement was to be confidential, or that there was to be any right to take out a patent in regard to it. It was a communication made to them in the course of their duty as public officers, and the moment it was made to them it became public property. It was not within their power to withhold, in any way, from the public the full benefit of that communication.

My Lords, I have made these observations upon the assumption —and it is only an assumption—that there was, in that communication and in that statement in the report, something that was new. I am not satisfied by any means that there was anything new in this statement so introduced into the report. I should require nothing more to prevent my being satisfied that that was so, than a statement which I find under the hand of the Appellant in this case, in one of his letters, and that is the only additional observation which I desire to make to your Lordships.

My Lords, the report to which I have referred was in type and was dated on the 31st of January, 1872. The provisional specification for the patent on which the Appellant relies was dated on the

9th of March in the same year; the report dated the 31st of January was sent to the Board of Trade on the 26th of March, and on the 27th of March, 1872, the Appellant wrote this letter to one of the officials, one of the servants of the Respondents, the gas company:—"My dear *Phillips*, We sent in our report late yesterday afternoon, because we could not keep it back any longer. Have you got *Odling's* or *Letheby's* reports? *Odling* called here, and I told him that we had a report in print. *Foster* is out" (he was the secretary of the gas referees), "and the copies locked up" (that is to say, the copies of the report which had been sent in to the Board of Trade), "but I will send you one to-morrow." The letter ends with this sentence: "All the suggestions in the report have been communicated to *Trewby* and others months ago." This, my Lords, was written on the 27th of March; the provisional specification is dated the 9th of March, not three weeks previously, and there is this statement under the hand of the Appellant, that all the suggestions in the report had been made known to *Trewby* and to others months before. My Lords, it seems to me to be perfectly impossible, in view of these facts, that the Appellant could maintain any claim to this invention, as a novelty, on the 9th of March, 1872.

I quite agree in the motion which my noble and learned friend has made, that the appeal should be dismissed.

LORD GORDON:—

My Lords, this case is very voluminous, but the points necessary for its decision which require to be considered are few, and, though of considerable importance, are not, I think, attended with much difficulty.

The Appellant was one of three gas referees appointed by the Board of Trade under the *City of London Gas Act* of 1868. The 36th section of that Act provided that the referees should from time to time ascertain with what degree of purity each company could reasonably be required to make and supply gas continually, without occasioning a nuisance to the neighbourhood in which the works were situated, and should thereupon prescribe and certify the maximum amount of impurity, in each form, with which gas supplied by the company should be allowed to be charged, and the

H L. (E.) 1877

PATTERSON v. GAS LIGHT AND COKE COMPANY.

time from which the allowance thereof should be enforced as against each company, regard being had to the necessity for any alteration of works by a company consequent on any such certificate.

It was the duty of the referees, in virtue of this provision, to make themselves acquainted with the modes of manufacture of gas adopted by each company, and to ascertain how far the manufacture could be improved and the gas purified. It was their duty to give the companies concerned all the assistance which their practical knowledge enabled them to give towards the purification of the gas. Facilities were afforded to the referees by the various gas companies for experimenting, and it is in evidence that many experiments were made by the companies at the desire of and in presence of the referees. In this way the referees obtained information, and any improvements in the matter of purification which were in that way discovered were, I think, the property of the public, for whose benefit the referees were employed by the Government. The referees recognised that it was their duty to disclose to the public the improvements which had occurred to them in the course of their investigations; and accordingly they prepared a Report on the subject to the Board of Trade. This report must have taken some time to prepare, and all the three referees were of course engaged in its preparation and knew its contents. There were no secrets in the report. The referees were the servants of the public, and they were compiling the report for the information of the public. Any information possessed by one of the referees and communicated to the others was not of the nature of a confidential communication, such as might be made by a master to a servant, but was information communicated by one servant to another for the advantage of their common master—the public. The report in question was dated the 31st of January, 1872, and its contents must have been well known to the three referees, and known to them in the way I have stated, prior to that date. But the report was not given to the Board of Trade till the 26th of March, 1872. As soon as it reached that Board it was published, and thus became known to all the public.

It seems to have occurred to the Appellant, after the preparation of the report, which was dated, as I have said, on the 31st of

January, and before it was formally delivered to the Board of Trade on the 26th of March, that one of the improvements in the report for the purification of gas, and which he claims to have discovered, might be made the subject of a patent; and, accordingly, on the 9th of March, 1872, he presented a petition for a patent for "Improvements in the Purification of Coal Gas;" and the patent which he subsequently obtained was dated on that day. He now insists that the patent so obtained is valid, and that he is entitled to prevent the public from using the patented process without making a previous arrangement with him. And the present action has been brought to try the question. The Respondents object to the validity of the patent on the ground generally that the processes claimed by the Appellant were all known before its date. The Vice-Chancellor repelled the objections to the patent; but the Court of Appeal sustained them, and decided that the patent was invalid.

Before adverting to the special objections to the patent I shall consider the objection raised to it founded on the circumstances under which it was granted.

I think the position of the referees with reference to the report is well expressed by Lord Justice *James*, when he says: "It is to be borne in mind that the report when made belonged absolutely to the State:—[His Lordship read the passage already cited by Lord *Blackburn*.]

The Appellant here was, in my view, a public servant, working for the benefit of the public, and bound to give the public all the information and assistance in his power. Any discovery made by him in the course of his public duty was, I consider, the property of the public, and he was not entitled to apply it to his own private advantage. I do not attribute any corrupt motives to the Appellant in applying for the patent; but in my view his conduct was not very different in principle from that of a servant employed to dig for precious stones, and who, when he has found one, puts it in his pocket for his own private profit, instead of handing it over to his employer. The act of such a servant could not be defended in point of law. He could not be heard to say that the stone belonged to him; and I am inclined to think that it is as little in

H. L. (E.) 1877 PATTERSON v. GAS LIGHT AND COKE COMPANY.

the mouth of the Appellant to say that he is to have the benefit of the patent in question. The public not only received no consideration for the patent, but the subject of it was actually the property of the public. I entertain, therefore, the gravest doubt whether the Appellant was not legally precluded from obtaining the patent, and whether it is not altogether void.

But I am of opinion, supposing that the Appellant was entitled to obtain a patent, that the patent obtained is invalid in respect that, admittedly, the processes sought to be patented were known to the Appellant's co-referees before the date of the patent. As I have said, I think that in the circumstances there was no question of confidentiality between the Appellant and the other referees, and that the referees were bound to give the public the benefit of the knowledge they possessed. I quite concur in the observations which have been made by my noble and learned friend on the woolsack with reference to the evidence attempted to be produced with regard to the alleged confidentiality between the referees. I do not think that there is evidence in point of fact of such an understanding as is deposed to by one of the witnesses, and farther, in point of law, I certainly demur altogether to the right of any such confidentiality existing between them. I think their knowledge of the processes in question was in substance the knowledge of the public; and therefore that the processes sought to be patented being known to the public the patent is void. To hold that, in the circumstances which occur here, a patent could be taken out, would make the report to the Board of Trade a mere sham; it would be to give information with the one hand, and to withhold it with the other, a result to which no countenance can be given.

I think that in the circumstances here it is unnecessary to consider the special objections urged by the Respondents to the validity of the patent. But I have carefully considered the objections to the first two heads of the specification on which the Appellant was heard at your Lordships' Bar, and I concur with your Lordships in thinking that it has been proved that the modes of purification there claimed were known modes before the date of the patent, and, that being so, that the patent is therefore invalid *in toto*. As

the evidence in regard to this matter has been so fully stated by your Lordships, I do not consider it necessary to go into it.

I concur in thinking that the appeal must be dismissed.

Decree appealed from affirmed; and appeal dismissed.

Lords' Journals, 13th December, 1877.

Solicitor for the Appellant: *Appellant in Person.*
Solicitors for the Respondents: *Curtis & Bedford.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1877 Dec. 3.

MISS ANN AND MISS JESSIE McPHERSON APPELLANTS; DR. THOMAS WATT AND JOHN WATT, JUN. RESPONDENTS.

Disguised Purchase by a Solicitor from his own Clients.

An advocate in *Aberdeen* is the same as an attorney or solicitor elsewhere.

Hence when an *Aberdeen* advocate purchased, nominally for his brother, but really for himself, certain houses, the property of two ladies for whom he was agent, concealing from them the fact that he was buying for himself:—

Held (reversing the decision appealed from), that the purchase could not be enforced.

Per THE LORD CHANCELLOR (1):—Assuming that in every respect this was a sale which might have been supported had the ladies been told that their agent was himself the purchaser, it cannot be supported, that fact not having been disclosed.

IN November, 1875, Mr. *John Watt*, Jun., an advocate in *Aberdeen*, not disclosing his interest, purchased, in the name of his brother, Dr. *Watt*, from the Appellants certain houses of which they were trustees.

In October, 1875, a brother of the Appellants, Mr. *Hugh McPherson*, who appeared to act in the executory business of the trust, desiring an investment for a sum of trust money, called upon *John Watt*, Jun., for advice. At this interview *John Watt*, Jun., advised *Hugh McPherson* not to advertise the houses in question for sale, promising to endeavour to obtain a purchaser. A few days afterwards *John Watt*, Jun., presented his brother, Dr. *Thomas Watt*, as a purchaser, whose offer of £1900 was accepted by the trustees, Miss *Ann* and Miss *Jessie McPherson*, the above Appellants, they believing that Dr. *Watt* was the only and true purchaser, and that *John Watt*, Jun., was acting in the matter as their solicitor; whereas, in fact, *John Watt*, Jun., had previously arranged with his brother that he should have, at half the price, two of the houses, which he afterwards disposed of at a profit.

On the 6th of March, 1876, the Appellants brought an action in the Court of Session to have the sale set aside on the ground

(1) Lord *Cairns*.

that *John Watt*, Jun., was at the time their agent and excluded from the purchase, except with their consent in full knowledge of his interest in the contract. The Lord Ordinary (1), on the 4th of July, 1876, set aside the sale. But, on the 2nd of March, 1877, the First Division (Lord *Shand* dissenting) recalled the Lord Ordinary's interlocutor and repelled the reasons of reduction (2). On appeal to the House,

Mr. *E. E. Kay*, Q.C., and Mr. *Herschell*, Q.C., for the Appellants, maintained that if in a transaction between principal and agent there has been any underhand dealing by the agent, however fair the transaction may be in substance, it has no validity: *Murphy* v. *O'Shea* (3); *Lewis* v. *Hillman* (4); *Charter* v. *Trevelyan* (5). An agent is bound to disclose to his principal the exact nature of his interests and all material information: *Dunne* v. *English* (6); *Tate* v. *Williamson* (7). Even if *John Watt*, Jun., was not actually an agent, he was in some degree of confidence, and took advantage of that confidence: *Gibson* v. *Jeyes* (8); *Smith* v. *Kay* (9); *Billage* v. *Southee* (10). The whole sale was tainted, and therefore could not be sustained.

Mr. *Horace Davey*, Q.C., and Mr. *Rhind* (of the Scotch Bar), for the Respondents, argued that the decision of the Court below was correct (2). *John Watt*, Jun., was not the agent either for this sale or for the trust property generally. But even admitting that he had acted previously as attorney to different members of the *McPherson* family, an attorney may deal with a client as a stranger, where he is not under the duty of advising him: *Holman* v. *Loynes* (11): *Cane* v. *Allen* (12). In *Gibson* v. *Jeyes* (8) Lord *Eldon* was alluding to an attorney actually engaged in the transaction. But here *John Watt*, Jun., was not the attorney *in hac re*. The relation of solicitor and client may exist in one transaction, and therefore personal influence or ascendency may operate in

(1) Lord *Curriehill*.
(2) Scotch Cases, 4th Series, vol. iv. p. 601.
(3) 2 J. & Lat. 422.
(4) 3 H. L. C. 630.
(5) 11 Cl. & F. 714.
(6) Law Rep. 18 Eq. 524, 534.
(7) Law Rep. 1 Eq. 528; Ibid. 2 Ch. Ap. 55.
(8) 6 Ves. 278.
(9) 7 H. L. C. 750.
(10) 9 Hare, 534, 540.
(11) 4 De G. & M. 281.
(12) 2 Dow. 294.

H. L. (Sc). 1877 McPherson v. Watt.

another; yet the relation not existing *in hac re*, the rule against an attorney purchasing, except he acts with his client on an equal footing, does not apply: *Edwards* v. *Meyrick* (1); *Montesquieu* v. *Sandys* (2). *John Watt*, Jun., was only guilty of an inadvertence in not disclosing his intention to purchase to the trustees. If the decision of the Court below was reversed it would carry the dealing between attorney and client to an extent which was not now the law of *England* or *Scotland*.

At the conclusion of the arguments on behalf of the Respondents their Lordships delivered the following opinions, disclosing fully the facts of the case, as well as the grounds of the ultimate decision:—

The Lord Chancellor (3):—

My Lords, in this case two separate proceedings originated in the Court of Session. One of these was a proceeding for the purpose of implementing, or, as we should say in this country, of obtaining the specific performance of, a contract for the sale by the Appellants to the Respondent, Dr. *Watt*, of four houses in *Aberdeen*. The other proceeding commenced with a summons for reducing the documents and letters which constitute the contract for the sale of those houses. In those two proceedings taken together, an interlocutor was pronounced by the Lord Ordinary, which, in substance, assoilzied the Defenders from the proceeding for obtaining specific performance and reduced the contract for the sale. Against that interlocutor there was a reclaiming note to the First Division of the Court of Session, and there, a difference of opinion arose between the Judges: Lord *Shand* holding, with the Lord Ordinary (4), that the contract should be set aside. On the other hand, the Lord President, with Lord *Deas* and Lord *Mure*, decided that an interlocutor should be pronounced in accordance with the conclusions of the summons for implement of the contract; and against that interlocutor so pronounced by the First Division of the Court of Session the present appeal is brought before your Lordships.

(1) 2 Hare, 70.
(2) 18 Ves. 313.
(3) Lord *Cairns*.
(4) Lord *Curriehill*.

My Lords, there is happily no serious controversy with regard to the facts of the case; and as I understand the opinions of the learned Judges below, there is no controversy between them as regards the general principles of law which should be applied. The only question is a question which arises unfortunately in many cases, namely, how these principles should be applied to the facts of the particular case.

The Appellants are two ladies in *Aberdeen*, who are the trustees of the testamentary property of their father. Included in that testamentary property were the four houses in question; and it was right according to the provisions of the trust that these four houses should be sold. These ladies appear in the management of their executory business to have acted principally by their brother, Mr. *Hugh McPherson*, who himself had some interest in his father's property. He appears to have been a manufacturer at *Aberdeen* and a man of shrewdness and intelligence in his general business affairs; it was natural, therefore, that the sisters should act to a great extent through their brother, he having the qualifications which I have described. The Respondent, Mr. *John Watt*, Jun., is "an advocate of *Aberdeen*," a phrase which represents what is called "a writer" in other parts of *Scotland*, and would be called in this country "an attorney," or "a solicitor."

The main question of fact in the case is what was the precise relationship in which this Mr. *John Watt*, Jun., the Respondent, stood towards the Appellants, both generally, and also in the particular matter of the sale of these houses; because it appears that in the sale, which was made nominally to Dr. *Watt*, of *Darlington*, of the whole of the four houses, this Mr. *John Watt*, Jun., was interested to the extent of two of the houses. He, as to two of the houses, and not Dr. *Watt*, was the real purchaser; and it is also not a matter in controversy that this fact was not known at the time of the contract either to the two Appellants, the Misses *McPherson*, or to their brother Mr. *Hugh McPherson*. The question therefore to a great extent depends upon the real position which was filled by *John Watt*, Jun., because the learned Judges in the Court below, although they differ in their conclusions, agree about this, that if *John Watt*, Jun., had been the general lawyer, writer, or advocate for the trust, he could not maintain a purchase made

H. L. (Sc.) 1877 McPherson v. Watt.

of two of the houses for himself; and the learned Judges also appear to me not to differ upon this, that if the fact were established that *John Watt*, Jun., had been the law agent entrusted with the sale of these particular houses, neither in that case could he have maintained a purchase made by himself of two of the houses without the knowledge of his principals.

Now, my Lords, what was the real position of *John Watt*, Jun. His only connection with any members of the *McPherson* family, his only intercourse with them which can be traced in the evidence, was as a legal adviser in particular matters. Putting aside the transaction which is the subject of this suit, the particular matters in which he acted as the law adviser to the *McPherson* family are summed up by Lord *Shand* in his judgment, and with one or two qualifications that summing-up may be accepted, as it seems to me, as a correct exposition of the evidence in the case. Lord *Shand* says (1):

> The proof shews that an intimate business relation subsisted between *Watt* and the various members of the family who had the beneficial interest in the houses. He was law agent for every member of this family personally.

These words appear to me to be too large; the family appear to have been very numerous, for the testator was married twice and had children by each marriage—they amounted to seven or eight, and he certainly, so far as we see, does not appear to have been the law agent for every member of the family:

> His relation to them individually is, I think, of importance in ascertaining his relation towards the trust under which they were either trustees or beneficiaries, and enters materially into the question as to the position he assumed when Mr. *McPherson* first spoke to him with reference to the sale of these properties. He was law agent for the two ladies, who, as trustees, are the Defenders here (that is, the Appellants) in their personal business. In his evidence, he explains that he was consulted in connection with Mrs. *McPherson's* executry (that is, the mother of the Appellants), that he acted for Miss *McPherson* (the elder of the Appellants), in preparing the transfer in her favour of two small properties, one at *Woodside*, and the other in *James Street, Aberdeen*, and that he continued to draw the rents of these properties for her. So recently as the spring of 1875—a few months before the transaction here challenged—on the employment of the two ladies, given through their brother, he carried through a service in their favour as heirs of their brother *George*, and had them also decerned as executrixes

(1) Scotch Cases, 4th Series, vol. iv. p. 615.

to the moveable estate. He acted for Mrs. *Black*, another sister, in preparing her marriage contract (and I may add that he was a trustee of that marriage contract).' He was Mr. *Hugh James McPherson's* ordinary and only law agent, and advised him as to his contract of copartnery and contract of marriage.

Now, my Lords, upon that statement of fact I wish to say distinctly, that if the matter had rested upon these facts which I have thus stated in the words of Lord *Shand*, if there had been nothing more in the position of Mr. *Watt*, I, for my part, should have been of opinion that there was not in these separate and collateral employments of *Watt* as law agent sufficient to have brought him within the rules of law applying to persons who occupy a fiduciary position and who buy for themselves. But, my Lords, these facts are of importance as giving us a description of the circumstances under which Mr. *Watt* came to be familiar and intimate with the *McPherson* family, and they enable us the more readily to understand the position he assumed with regard to this particular transaction.

There are two witnesses whose evidence we must look to; the one being *Watt* himself, and the other *Hugh McPherson;* and I am bound to say that, for all material purposes, I find little or no discrepancy between the evidence of the two. Mr. *Watt* begins his evidence by insisting upon a matter which I notice merely because it has been put in the forefront of his evidence, namely, the statement that on several occasions before this particular contract was entered into, he had been appealed to by *Hugh McPherson* to buy some or all of these houses himself, and had refused to do so. I observe that that is contradicted by *Hugh McPherson.* I do not think it of much consequence whether it is true or not, that is to say, whether the memory of Mr. *Watt* is the better memory of the two witnesses. If it is the case that he had been appealed to, to buy them, and had refused to buy them, if that could be taken as true, and if it could have any bearing at all upon the matter, it seems to me that the bearing would be this; it would amount to a statement which he had made to *McPherson* that he did not wish and did not intend to become the purchaser, and therefore would not only not lead *McPherson* to suspect that he was buying for himself, but would confirm him in the certainty that he did not intend to buy for his own purposes.

H. L. (Sc.)
1877
McPherson
v.
Watt.

Mr. *Watt* says:

When I declined to make the purchase, Mr. *McPherson* asked me to see if I could get any other person to buy the houses. That was at the same time as he proposed to raise the rents, and when I declined to buy for myself. Prior to that my brother in *Darlington* had employed me to buy some property at *Yeat's Lane, Aberdeen*. He wanted some further investment, and it occurred to me then to write him on the subject. I wrote my brother accordingly.

Then, further on, he says:

Before the sum of £1900 was agreed upon, Mr. *McPherson* and I had various communings. I offered him £1850. He said he had seen Mr. *Robb*, the builder, the other day, and that he had told him he should get now for the houses £2000 or £2100. I said that was a good deal more than their value, but that my brother might be inclined to give £1900. Mr. *McPherson* asked £1950, and ultimately he said he would sell them for £1900 on condition that all expenses of the transfer were paid by the purchaser, and that he would advise his sister to accept of such an offer. When we were haggling about the price in that way, reference was made to the former attempt to sell the houses. I said they had been formerly exposed at £1800, and had not sold. All that took place about the 9th or 10th November.

Now Mr. *McPherson* makes this statement:

Q. In the autumn of 1875, was there a sum of £2000 of your marriage contract funds to be invested?—*A.* Yes. *Q.* Did you speak to Mr. *Watt* about finding an investment for it?—*A.* Yes. *Q.* In the course of conversation on that subject was there anything said about selling the property in *Ann Place*?—*A.* Nothing whatever. *Q.* How did you first come to speak to Mr. *Watt* about the sale of that property?—*A.* He could not find an investment for the £2000; he said that investments were very scarce indeed, and that he had a lot of money lying in his hand to invest for clients, but could not get properties over which to lend it, as they were going so very high in the market. He just casually mentioned that. As things were going so high, and as we had to sell the *Ann Street* property in 1877, I said I should think of advertising it for sale. *Q.* Did you do so?—*A.* I did not; he asked me not to do so as he thought he would be able to find a purchaser.

My Lords, I pause here for the purpose of saying that this conversation—the suggestion of advertising for sale made by Mr. *McPherson* and the persuasion on the part of *Watt* not to do so—was noticed in the statement of facts for the Appellants, and therefore Mr. *Watt* was aware that this was part of the allegation on behalf of the Appellants, and as I find in his evidence no contradiction whatever of this, I think I am entitled to take it as being a part of the conversation between himself and *McPherson* which he is not prepared to deny.

Mr. *McPherson's* evidence continues thus:

Q. About what time would this be?—*A.* About the end of October, so far as I recollect. *Q.* When did you next hear from him on the subject?—*A.* Very soon afterwards. *Q.* Where was this?—*A.* In my place of business. *Q.* Did he call upon you?—*A.* Yes. *Q.* What did he say?—*A.* He asked what price I wanted for the houses, and I said I thought each double tenement would bring £1000 or £1200, but that I did not know the real value of them; I then said I would take £2000. *Q.* What did he say?—*A.* He would not hear of it; he told me that property of that description ought to return about 7½ per cent., and he made a calculation shewing me that even if we got £1900 we would be a great deal better off. *Q.* Did he give you to understand that he had a purchaser in view?—*A.* He told me that he had his brother. *Q.* What did he say about his brother?—*A.* He said that his brother had money to invest, and wanted an investment in heritable property. He had told me that before, and that his brother had told him to look out for an investment for him; but he did not say to what amount. He said he would buy the property for his brother. *Q.* Was that at £1900?—*A.* There was no price mentioned" (that is on the first occasion) "*Q.* At the time you had this conversation with him, when you said you would take £2000 and he said he would not hear of it, but that £1900 might be given, did he say that he had communicated with his brother?—*A.* Yes, and he seemed to be able to close with the transaction. I said that if he would give me a written offer on behalf of his brother at that sum, I would recommend the trustees to accept it. *Q.* Did that close the conversation on that occasion?—*A.* Yes. *Q.* Can you give me the date of that conversation?—*A.* It was in November, but I cannot say what day. *Q.* Early in November?—*A.* I think it was the day before the first letter."

My Lords, before I observe upon that, I will add here that in a letter written by *Watt* to his brother, a part of which is printed, and which I shall have to refer to for another purpose, there occurs this sentence: "I said to Mr. *McPherson* I would put these houses in your view."

My Lords, what is the inference which I draw from the testimony I have read? Mr. *Watt* was a law agent employed by the Appellants, and employed by Mr *McPherson* in other matters. It is to be considered how far he was employed by them, that is to say, how far he intervened for the purpose of giving them advice in the particular transaction now under consideration. There can be no question how he intervened or to what extent he intervened, for both he and Mr. *McPherson* are agreed upon the matter. The extent to which he intervened was this: when *Hugh McPherson* was disposed to advertise the property for auction *John Watt* dissuaded him; he advised him (that is to say he gave him advice which was not the advice of a stranger, but the advice of one who

H. L. (Sc.) 1877 McPherson v. Watt.

had been the law agent of the family in many other matters) not to put up the property for sale by auction when the value could be obtained by a process that could have left nothing to be challenged as regards what the value really was.

But the matter did not stop there. Mr. *Hugh McPherson*, communing with Mr. *Watt* who was calling upon him on business with regard to the investment of a sum of £2000 of his own money, told Mr. *Watt* that he did not himself know what was the real value of these houses, or what was the sum which he should get for them, but speaking in the same way, that is in what I can call nothing but a confidential manner, with him who was his law adviser,—if you please in other matters,—he gave it as his opinion that he ought to receive for the houses the sum of £2000 or £2100, and Mr. *Watt*, again communing with him in this confidential manner, tells him that that was an extravagant sum, that he ought not in his own mind to think that the houses were worth that sum, and he makes a calculation based upon the return which house property of this kind should give, and advises him (for I can call it nothing else), that he would be well off and ought to be satisfied if he could get £1900 for the houses. Now, my Lords, I care not whether this was done as a piece of business for which Mr. *Watt* might have charged as a law-agent and sent in a bill of costs or not. It was done by him in that confidence which existed between him and the *McPherson* family, which made the *McPherson* family resort to him, which made in particular Mr. *Hugh McPherson* resort to him upon this occasion and consult him as to the disposal of the property.

And not only have you the advice about not putting up the property for sale by auction, and as to the price which ought to be obtained for it, but you have finally the commission entrusted by *Hugh McPherson* to *Watt*, to obtain, if he could, a purchaser upon the terms which he had told *McPherson* he ought to be satisfied with. In writing to his brother, the Respondent admits that this was the case, and says that he had received from *McPherson* the commission of putting these houses on these terms before his notice with a view to a purchase.

Now, my Lords, I own that after this I am somewhat at a loss to perceive the applicability of a number of cases cited at your

Lordships' bar in which a question has arisen whether an attorney has or has not been the adviser of a vendor, to use the frequent expression, *in hac re*. Your Lordships have here a narrative which makes it clear to my mind, beyond a possibility of doubt, that whether *Watt* was a gratuitous adviser or a paid adviser of *McPherson*, he was not only an adviser, but the only adviser of *McPherson* with regard to the sale of these houses, and although *McPherson* may have been a man of shrewdness and intelligence in his business, he did not profess to be a man acquainted with the value of house property, or able himself to form an opinion as to the best mode of disposing of it.

Now, my Lords, in this state of things I must say again, that although I cannot but recognise the position of *Watt* as the adviser of *McPherson*, still, considering that he was dealing with a man of shrewdness and business habits, as *McPherson* was, if there had not occurred that unfortunate circumstance which did occur, the concealment of the fact—I use the term "concealment" in no offensive way, perhaps I had better say the non-disclosure of the fact—that *Watt* was himself the purchaser of two of the houses, if there had not been that element in the transaction, I, speaking for myself alone, should have been very loth, upon all the other facts of the case, to have held that this might not have been a transaction capable of being supported as between *Watt* and *McPherson*. But when, added to the fact that there was this confidential intercourse, this confidential advice, this which I cannot call otherwise than a fiduciary relationship subsisting between *McPherson* and *Watt*, and that *Watt*, while purchasing in part for himself, did not disclose that fact to *McPherson*, then, my Lords, I am obliged to come to the conclusion that the fact of that non-disclosure prevents the transaction from being supported in any Court administering equity.

My Lords, it is here that the pointed observations made by Lord *St. Leonards* in this House, in the case of *Lewis* v. *Hillman* (1), become so very material. They were not observations laying down any new rule of law, for the same principles had already been applied in numerous cases, but what Lord *St. Leonards* said in that case was this: Take the case of a sale of

(1) 3 H. L. C. 607, 630.

H. L. (Sc.) 1877 McPherson v. Watt.

any kind, which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported, yet if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent, if the purchase has been made in the name of some other person for that law agent, that is a sale which cannot be supported. My Lords, so say I here. Assume, if you please, that in every respect, as to price, and as to all other things connected with the sale, this was a sale which might have been supported had the *McPherson* family been told that *Watt* was the purchaser, in my opinion it cannot be supported from the circumstance that that fact was not disclosed to them.

My Lords, it does happen in this case—it is a somewhat singular thing that it does happen, for generally there is no evidence of the kind—that the objection founded on the non-disclosure does not appear to have been an after-thought. It might be said in many cases, It is very easy, after the sale is transacted and after the matter is concluded and closed, to say that if the vendor had known that the person really buying was his law agent he would have hesitated before he sold; but it does so happen that it was said here before the matter was concluded—for your Lordships have it in evidence that when *Hugh McPherson* went with the offer of £1900 to consult his sisters and to ask them whether they would accept it, one of them said, "Is this offer made to you for Mr. *Watt* the advocate himself?" and her brother said "No, it is for Dr. *Watt* of *Darlington*;" "for (she said) if it was for himself we should require some independent advice, and that before the offer was accepted." Finding it was an offer made, as she understood, on behalf of Dr. *Watt*, she said that she and her sister were willing to accept it.

Some question was raised in this case as to whether, at the time of the contract, the Respondent *John Watt* was really buying in part for himself, or whether the transaction was not rather this, that the purchase was made in the first instance by Dr. *Watt*, and that there was afterwards a resale to *John Watt* of two of the houses. There is in evidence, not a complete letter, but a part of a letter between *John Watt* and his brother Dr. *Watt*. I am unable to read that letter and to entertain the slightest doubt

that the nature of this transaction was this, that before any contract was made, before any assent was given by Dr. *Watt* to the proposal to buy any of the property, the proposal made to Dr. *Watt* by his brother was this:—There are four houses to be sold, if you will buy two I will buy the other two, and we will get them at such and such a price, so much for your two, and so much for my two. My Lords, it seems to me that in principle the case is exactly the same, neither better nor worse, than it would have been, if, in place of Dr. *Watt* being beneficially interested in two of the houses, he had not been interested in any one of them, and the person really interested in the whole had been *John Watt*, Jun.

The only further observation I have to make is, that even as to the two houses in which Dr. *Watt* is interested, it seems to me impossible that the sale can be supported, for the sale as between the vendor and purchaser was one complete and entire sale, and even if you were to separate it into two parts, and to look at it as a sale, first of two houses to *John Watt*, and then of two to Dr. *Watt*, the principle upon which, as between *John Watt* and his brother, the price was arrived at was this, that *John Watt* should have his two houses at one half of the total price, and every mischief, therefore, which would exist, and which would render it impossible that an agent, or a person in *John Watt's* position, should purchase for his own benefit, would apply to the mode in which the price was fixed for the houses of which Dr. *Watt* was the purchaser.

My Lords, the result is that I am obliged, with great respect for the three learned Judges of the Court below who were of a different opinion, to advise your Lordships that the sounder conclusion was that arrived at by Lord *Curriehill* and Lord *Shand*, and to propose to your Lordships that the interlocutor of the Court of Session should be reversed.

Lord O'Hagan:—

My Lords, after some hesitation, I have arrived at the same conclusion; and I should be content to rest it on the reasons so amply given by my noble and learned friend, but that my sincere respect for the opinions of the learned Judges in the Court below,

H. L. (Sc.) 1877 McPherson. v. Watt.

from which I feel constrained to differ, induces me to state briefly the grounds on which I think myself justified in holding that this appeal should be allowed.

On the law of the case there has been no real controversy, either in *Scotland* or at your Lordships' Bar. An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist.

The law being clear, there is not much contradiction in the evidence. So far as there is any it arises between Mr. *Watt* and Mr. *McPherson*, and the Lord Ordinary has said in the note to his interlocutor: "Having seen and heard both of the witnesses, I am inclined to adopt the version given by Mr. *McPherson*." The impression made upon the Judge who has heard *vivâ voce* evidence, and noted the demeanour of those who have given it, is rarely to be disregarded by an appellate tribunal. In my view, however, there is enough in the facts which are not disputed to decide the issue in favour of the Appellants.

There are only two questions in the case. Was Mr. *Watt* the agent of the Appellants for the purposes of the sale? And if he was, did he conceal the fact that, to a large extent, the purchase was for himself though nominally made for his brother? If these questions be answered in the affirmative, as I think they ought to be, the transaction cannot be maintained.

As to the agency, your Lordships have heard much statement

and argument with reference to the relations of Mr. *Watt* to the trust estate before the sale of the houses; and there can be no doubt that on some occasions he acted as law agent to the trustees. But those occasions were not numerous or important: and if there had been nothing more to be considered, the occurrences antecedent to this purchase could scarcely have been held sufficient to make it void. They are, however, of some importance, as shewing that when Mr. *McPherson* came to communicate about the houses with Mr. *Watt*, he did not meet with a stranger but with one who had had professional relations with him as to the subject-matters of the trust—by whom the trustees had been advised and in whom they had confided. In this way they may throw some light on the probable understanding of the parties in entering on the business of the contract. In that business, if Mr. *McPherson* is to be relied on, he dealt with Mr. *Watt* as an agent; through it all he had "no doubt" of the agency; and before the Lord Ordinary he swore that he looked upon Mr. *Watt* as "commissioned for the trustees." He gives, at length, an account of two interviews, from which I shall read a few words. Of the first interview he says:

> As things were going so high, and as we had to sell the *Ann Street* property in 1877, I said I should think of advertising it for sale. *Q.* Did you do so?—*A.* I did not; he asked me not to do so, as he thought he would be able to find a purchaser.

And of the second:

> *Q.* What did he say?—*A.* He asked what price I wanted for the houses, and I said I thought each double tenement would bring £1000 or £1200, but that I did not know the real value of them; I then said I would take £2000. *Q.* What did he say?—*A.* He would not hear of it; he told me that property of that description ought to return about 7½ per cent., and he made a calculation shewing me that even if we got £1900 we would be a great deal better off.

What is the statement on the other side? Mr. *Watt's* account of one of the interviews appears to me more fatal to his case than that of Mr. *McPherson*. He says that the latter had repeatedly urged him to buy the houses, and that he had declined. On this point there is some dispute between them. In my opinion it is not very material. But there is a sentence which appears of much significance: "He," *McPherson*, "then said that if I heard of any one wanting such a property I might let them know;" and again, "When I declined to make the purchase Mr. *McPherson* asked

H. L. (Sc.) 1877 McPherson v. Watt.

me to see if I could get any other person to buy the houses." If Mr. *Watt* be right in saying that he had been pressed to purchase for himself, we have him in this position. He had advised Mr. *McPherson* not to advertise the sale. He had given the best reason for believing that he had no notion of being himself the purchaser, and, *uno flatu* with his refusal, he accepts what Mr. *McPherson*—seemingly with some reason—calls a "commission" to see, in his own words, "if he could get any other person to buy the houses." Then we have his evidence, that he actively proceeded to execute the commission, and that he passed between his brother and Mr. *McPherson*, with whom he had "various communings," in which the value of the property was discussed and the price ultimately agreed on after much "haggling," for the purpose on his part of reducing it.

Certainly it is notable that in labouring for the reduction, Mr. *Watt* was labouring for himself, without the knowledge of Mr. *McPherson;* for it would seem that at that time he had not only contemplated, but arranged furtively with his brother for, a re-sale to himself of half of the premises which he had so cheapened, and which, by his advice, had not been offered to public competition. It is scarcely matter of surprise that when his true position was discovered, and it was found that he had made substantial profit by the transaction, the trustees were not disposed to allow it to pass unchallenged.

Then we have the evidence of his activity in the mutilated letter to his brother, to which the Lord Chancellor has referred. But I will dwell no more on this branch of the case. It seems to me that on the evidence of Mr. *Watt* himself, and the undisputed circumstances, he must be considered to have acted as an agent, with all the responsibilities and disabilities attaching to that position. We have heard much ingenious reasoning as to the necessity of establishing agency, not in a general way, but *in hac re*. I can only say that if Mr. *Watt* was an agent at all, he was an agent *in hac re* in the matter of the sale which he was "commissioned" to undertake, and undertook accordingly.

If the first question be rightly answered in the affirmative, there can be no doubt about the answer to the second. There was admitted concealment, or, if you will, non-disclosure of the fact that Mr. *Watt* was really purchasing in part for himself. And I

concur with my noble and learned friend—indeed Mr. *Davey* did not controvert it—that if Mr. *Watt* can be held entitled to support a purchase so covertly accomplished of two of the houses, he must have been equally entitled to maintain, under like circumstances, a covert purchase of the four.

As to the proof of concealment, I content myself with taking one question and answer, which establish beyond doubt that at the time of the sale the re-sale had been agreed on. *Q.* "Can you tell us as nearly as possible the exact date when your brother had agreed to re-sell two of the houses to you?—*A.* It was before I closed the bargain with Mr. *McPherson*." "Upon the 9th of November I considered that my brother had bought the four houses for himself. It was before that that he had agreed to re-sell the two to me. He wrote me to that effect." If Mr. *Watt* was agent when that re-sale took place, he cannot possibly take the profit of his bargain.

It is not necessary to discuss the question as to the inadequacy of price or any other question, or to investigate the motives which may have actuated Mr. *Watt*. He may not have had any fraudulent design; he may have conceived himself warranted in acting as he did; he may not have apprehended the duties imposed by his fiduciary relations. But it is not the less clear that the law must be enforced, and the purchase nullified.

I do not think it necessary to add anything to the observations of the Lord Chancellor. As to the difficulty which seems to have pressed some of the learned Judges with reference to the dual agency, I concur with Lord *Shand* that a single agent may well advise, and often does advise, a buyer and a seller, although the duty is one of difficulty and delicacy, and I do not see that in discharging it he is relieved from the obligations as to each which confessedly he would owe to one of them if acting for one only.

On the whole, I am of opinion that the judgment of the Court below should be reversed, and the appeal allowed with costs.

Lord Blackburn (1):—

My Lords, I am also of the same opinion, namely, that the

(1) Revised by his Lordship in print.

H. L. (Sc.) 1877 McPherson v. Watt.

correct judgment would be that which the noble and learned Lord on the woolsack has indicated.

I think that in this case there is not any real dispute as to what the law is, for although there may have been a little difference, perhaps, in the manner in which it has been enunciated at different times, I think both in *England* and in *Scotland* the real substantial law is agreed upon. I think, also, that when one looks at the evidence in this case, there is not any real conflict of testimony as to what the facts are. But there is a very great conflict of opinion in the Courts below as to what the proper inference to be drawn from those facts is, and, when there have been three of the learned Judges in the Courts below taking one view, while two have taken the other, and I myself, in common, I believe, with all your Lordships, have come to the same conclusion as the minority in the Court below; I need hardly say that it was with me a matter of very considerable doubt, and requiring much consideration to see whether the proper inference was the one to which I have ultimately come, and for some considerable time I hesitated.

Now I will begin with some things about which I take it that in this case there is no doubt. Mr. *John Watt*, Jun., is an *Aberdeen* advocate. He has also acted as a conveyancer and what used in old times to be called a "money scrivener," and as a broker in the purchase and sale of estates. All those branches of the profession are pursued by writers in *Scotland* and by attorneys and solicitors in *England*, and they all necessarily involve this, that the writer or the attorney must stand towards his client in a position in which there has been, or there is, confidence more or less reposed in the attorney by his client. It has often been said that that circumstance does not render it impossible for an attorney to purchase property from his client, and that the mere fact of his being an attorney purchasing would cast upon him no more duty than would be cast upon a person in any other profession. If he purchases from his client in a matter totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client, just as any stranger may do, honestly telling the truth and without any fraudulent concealment, but being in no respect bound to do more than any other

purchaser would do. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him to purchase without doing a great deal more than would be expected from a stranger. In some cases it may turn upon this; that the attorney having been the general agent of the seller, has acquired an intimate knowledge of the condition of the property, and not only learnt as much as the seller himself knows, but perhaps a good deal more. In those cases he has acquired the knowledge as being the general agent of the vendor, and he has an unfair advantage in consequence, and there must not be an abuse of the knowledge which he has so acquired. In other cases the general agent has acquired an influence over his client, I may say an undue influence, and there have been many more cases of a similar character, all of which Mr. *Davey* referred to in his able argument at your Lordships' Bar, but I think not one of them really bears upon the question we have to consider.

My Lords, I think it but fair at once to state that there is no pretence here for saying that Mr. *Watt* was the general agent of the *McPhersons* in such a sense as to have acquired a particular knowledge about these houses, such as would have made it wrong to purchase them himself. Nor do I think that there is any ground for supposing that there was any undue influence exercised by him. I agree with what was said by the noble and learned Lord on the woolsack, namely, that if there had been a disclosure of himself as purchaser, if he had said what was the fact, "My brother *John Watt* and I are going to buy these houses between us," and had then gone on with the purchase, I now say, as at present advised, and speaking for myself alone, I should have thought that there was nothing to prevent the transaction standing.

But then there is one branch of the relation between attorneys and clients which does bear upon this. In a case which was referred to and cited at your Lordships' Bar, *Holman* v. *Loynes* (1), Lord Justice *Turner* mentions, among the instances in which an attorney cannot be allowed to deal with his client without divesting himself of his character, all cases in which the circumstances are such as to make it his duty to give advice to his client. When

[(1) 4 D. M. & G. 278.

H. L. (Sc.) 1877 McPherson v. Watt.

that is the case he cannot make a bargain without putting himself, as it has been commonly phrased, "at arm's length" from his client. From the very nature of things, where the duty exists that he should give his client advice, it should be disinterested advice, he cannot properly give that advice when he is purchasing himself without telling his client that he is purchasing. The mere fact, therefore, that he does not disclose that he is a purchaser, or that he is interested in the purchase, in cases where the client might say, It was your duty to give me such advice, gives the client a right, upon discovering the fact that the purchaser was in whole or in part the attorney whose duty it was to give him advice, to say, "I have an option either to set the purchase aside, if I please, or to let it stand, if I prefer to do so;" he is entitled to say, "This may be a very fair and proper bargain, but I do not choose to let it stand." I think the law, both in *England* and in *Scotland*, is that in such cases we do not inquire whether it was a good bargain or a bad bargain, before we set it aside. The mere fact that you, being in circumstances which made it your duty to give your client advice, have put yourself in such a position that, being the purchaser yourself, you cannot give disinterested advice, your own interests coming in conflict with his, that mere fact authorizes him to set aside the contract if he chooses so to do.

Now, my Lords, I think the real question which has arisen here has been, what position Mr. *John Watt*, Jun., in fact, stood in to *McPherson's* trustees. The two ladies were the trustees, but Mr. *Hugh McPherson*, their brother, of whom so much mention had been made, was also one of the beneficiaries, and I think we may fairly treat it as if he had been one of the trustees. He had to go to his sisters and consult them and get their consent, but for practical purposes I do not think there is much difference between the case as it stands now of *Hugh McPherson* being the man who made the bargain as the agent of the trustees, and what it would have been if he had himself been one of the trustees. When we come to look at the position of Mr. *John Watt*, Jun., what were the circumstances? I think Mr. *Edmond* had been the regular agent for the trust estate as long as there was any considerable estate to administer, as long as there was much to be done, but before this time he had dropped out of it. I do not

think it had been formally said, that he should be no longer agent, but he had ceased to do much or anything. There had recently been only two or three small things which had to be done by the trustees, and those two or three small things were all done by Mr. *John Watt*, Jun., I do not think there was enough in that to enable any one to say that he was the regular agent in such a manner as to acquire a knowledge of the condition of the property and so forth, but he had been employed as the attorney of the trustees in two or three small transactions. He was also the attorney for Mr. *Hugh McPherson* himself: he had acted for him in various things and was acting for him in the very transaction in which this negociation originated. He had also been law agent for one or two members of the family, and also for the two trustees in what little they had had to do in their own private affairs as distinguished from the affairs of the trust. I quite agree that no one of these things makes him the agent *in hac re* of the trustees, but it is impossible not to see that these facts have an important bearing upon this point, namely, whether in the transaction which did follow, the trustees had a right to expect that Mr. *John Watt*, Jun., would give them advice.

What actually took place was this. Mr. *Hugh McPherson* sent to Mr. *Watt* when Mr. *Watt* became the tenant of one of these houses at Whitsuntide (that was in May), 1874, and asked him if he would buy; he said he would not. Mr. *Hugh McPherson* says, I think, that he did not do that. I think it is most likely that Mr. *Watt's* memory may be right about it, and that he did do it at that time. Mr. *John Watt* uses some phrases in his evidence as if this offer had been renewed, and renewed much nearer to October, 1875, but Mr. *Hugh McPherson* denies that, and I do not myself think that it is very material whether that was the case or not. But what did take place at some time near to October is this: Mr. *Hugh McPherson* consulted Mr. *Watt* as his attorney (for it is clear that he did so consult him) about getting an investment for £2000 under his marriage settlement. Mr. *Watt* told him what I dare say was quite true, that money was very plentiful, and that he had a great deal of money in his hands seeking employment, which he could not get for it, and that, in short, Mr. *McPherson* would have some difficulty in finding an

H. L. (E.) 1877 McPherson v. Watt.

investment upon which he could lend his £2000 upon house property. Upon this—and here I think the evidence of both agrees—Mr. *McPherson* said, If that is so I think it will be a good time to sell the four houses, or the two sets of houses, belonging to the trust; and then there comes a slight difference in the words, but I think none in the substance. Mr. *McPherson* said: I think I will advertise them, Mr. *Watts'* account of the conversation here varies a little from Mr. *Hugh McPherson's*; but both agree in this, that *Watt* said, I can get a purchaser for them from a client of mine: my brother Dr. *Watt* is seeking to invest money, and I think I could get him to invest it in these houses.

Now, my Lords, if the first part of that had stood alone simply and solely, and without mention of the fact that his own client Dr. *Watt* was likely to be the purchaser, if he had said, I think I can find you a purchaser; and if Mr. *McPherson* had said, Try and get an offer to purchase if you can; I will submit your offer to the trustees,—I think it would be impossible to doubt that Mr. *John Watt*, Jun., would in that case have undertaken the duty which an attorney employed in the ordinary way to look out for a purchaser of a house would have taken upon himself, to advise the seller and to get the best possible price for him. I think the fact of his having been the law adviser, and acted as the business man of so many of the family, would be material in coming to that conclusion; it would be rather an inference of fact than anything else; but I think, as an inference of fact, it would be irresistible.

But, then, he does say, I will try and get a purchase from a client of mine, and not only from a client of mine, but I will try and get my own brother (mentioning his name) to purchase; and it is upon that, I think, that there has arisen in the mind of the Lord President the principal difficulty in the case. For myself, I quite agree and concede at once that whenever an attorney says, If you are wanting to sell your property which I am managing for you, I have got a client of my own wanting to purchase, shall I mention it to him? The attorney does not then promise that he will screw up his client; the fact that it is his own client that he is to go to would negative that. I agree with the Lord President to that extent; in settling the price he could not be the agent for both parties. But, with the greatest deference to the

Lord President, I cannot follow his reasoning beyond that. I cannot see that the attorney, if he acts as an agent for both, cannot be an agent with the duty to give any advice at all; it seems to me to be the contrary. It seems to me, as Lord *Shand* puts it, it is every day's practice, or a common thing, for a man to act as the agent for both sides, and to give both sides disinterested advice up to a certain point.

I think that Mr. *John Watt* shews pretty well here what might have been done by an agent for both sides. He writes to his brother whilst the transaction is pending, and says that it is at Mr. *McPherson's* request that he brings the matter before his view; and then he says he will himself buy two of the houses, and proceeds to advise his brother and to argue that it would be a good offer for him (the brother) to make. He points out that the rent is so-and-so, the feu duty so-and-so, mentions other particulars, and that the price is so-and-so, and in all respects he says (that is the meaning, I think), You will be well advised if you make this offer, it will be a good thing for you. That was giving his brother advice, and I do not think that that was in the slightest degree inconsistent with his duty to the *McPherson* trustees. They had told him, You may offer it to your brother, and make him the purchaser; and in doing so they had impliedly said, You may advise him if you like whether he shall enter into the bargain or not; do not betray our secrets, but give him what advice you please. But, on the other hand, although the *McPhersons* had done that, they were, I think, his clients, and they were entitled to have the advice, and the disinterested advice, of Mr. *John Watt*, Jun., as to what they should do. He was perfectly entitled to come to them and say, My client is willing to give you £950 for two houses, or £1900 for the four houses, and I advise you to take it; he was entitled to give them any reasons or arguments that he thought proper, but they were all to be *bonâ fide* disinterested reasons and arguments. He was advising them, and therefore he was quite in a different position from a man who was a stranger bargaining for himself. Such a man might say, Your house is not a good one; he might say it was valueless, and you had better sell it a great deal cheaper and take a smaller price for it. Such has been the course of business for at least 3000 years: "*It is*

H. L. (Sc.) 1877 McPherson v. Watt.

naught, *It is* naught, saith the buyer: but when he is gone his way, then he boasteth" (1). When a vendor is dealing with a stranger the purchaser is not to tell him any lies, but the vendor has no right to say, I expect and believe that he will give him disinterested advice. On the other hand, when an attorney is acting for both sides, it is otherwise. Then the vendor has a right to expect that there shall be disinterested and true advice given to him, and I do not see the practical difficulty of giving it.

My Lords, I need not enter further upon the subject, for the view on the one side was put by the Lord President, and that was agreed in by Lord *Deas* and Lord *Mure*, and the view on the other side was put by Lord *Shand* in his judgment. It all comes round to the same point, what is the proper inference of fact upon the facts before us? It is that at that time Mr. *John Watt*, Jun., was the agent of the *McPhersons* to this extent, that he ought to have given them advice, and if so, his buying the property for himself without their knowing it entitled them upon discovering that fact to set the contract aside.

There remains only one thing further to be observed. Every attorney dealing at all for himself will certainly be wise and prudent if it is not known to the vendors that he is dealing for himself to disclose that fact to any persons who may be his clients; it will save him the risk of having his contract set aside; but further than that I do not, as at present advised, think it is shewn that there was anything morally wrong in the conduct of Mr. *John Watt*, Jun., and Dr. *Watt* is free from blame altogether as far as I can perceive except so far as he was aware that his brother was very likely to make the contract with people who might trust him—certainly not further than that. My Lords, I have come to the conclusion (I am sorry for it, because I think it presses hardly upon Dr. *Watt*), that the contract is one entire contract for all the four houses as a lump thing, and if we were to say that one part of it should be set aside and the other part enforced, we should really be making two contracts of it. It follows that if we say that it ought to be set aside in the case of *John Watt*, Jun., it must be set aside altogether, and consequently the appeal must be allowed *in toto*.

(1) Proverbs, xx. 14.

Lord Gordon (1):—

My Lords, in this case there has been considerable difference of opinion in the Court below, and therefore the case as submitted to us has presented some difficulties. Those difficulties arise, however, chiefly from the inferences to be deduced from the facts which have been in controversy in the case. So far as regards the law I think there is really very little if any difference between the views of the learned Judges in the Court below and the views of your Lordships. In fact, the law of *Scotland* has to a great extent been founded upon the English decisions.

The question of fact was the matter that created any difficulty—and it was the only difficulty—in the Court below. That question was whether Mr. *John Watt*, Jun., acted as agent for the *McPherson* trustees. Now I am of opinion with Lord *Shand* and Lord *Curriehill*, that there is proof that Mr. *Watt* acted as agent for the trustees in reference to trust matters, but still it was only to a small extent, and I do not hold that that is sufficient to inculpate him so far as regards the issue raised in the present case. But I think it is proved that, after Mr. *Edmond* ceased to carry on active business, or after his death, whatever business required to be performed for the trustees, although perhaps not always in trust matters, was performed by Mr. *Watt*. The trust business, however, was very limited in amount after Mr. *Edmond's* death. But then we have also to consider (and this is the point chiefly urged by the Respondents) whether there is evidence that Mr. *Watt* really was acting as agent *in hac re* for the trustees with reference to the sale of these properties. Now upon that part of the case I must say that looking to what has been proved, I think that he must be regarded as having so acted. He did, in point of fact, act as agent for the trustees in several trust matters, and I think the inference to be drawn from the facts established by evidence in the case is that he was the agent for the trustees with reference to the sale of the houses in question. He was advising Mr. *McPherson*, who represented his sisters, the trustees, as to the sale of the houses. He (Mr. *Watt*) recommended that the properties should not be advertised for sale, and said that he would try to find a purchaser for them. That brings him into very imme-

(1) Revised by his Lordship.

H. L. (Sc.) 1877 McPherson v. Watt.

diate contact with Mr. *McPherson* upon a most important matter. He says, Do not advertise the subjects for sale, I will endeavour to find a purchaser. I think this shews that he was an agent in the matter for the trustees. It was for the benefit of the trustees that he was to try to find a purchaser; he professedly and openly had no personal interest in the matter, and he could not make a charge against any person except the trustees for the trouble he took. If he found a purchaser he would be paid for his trouble by means of the fees which he would receive as agent for the trustees with reference to the disposition which would be granted by the trustees to the purchaser. I may refer your Lordships to the missive of sale by which it was provided that the purchaser should pay "all expenses connected with the transfer." Now, if there had been a transfer or disposition executed carrying out these missives, it would have naturally fallen to Mr. *Watt* to adjust that transfer on behalf of the trustees, but under the provision in the missives the trustees would have been relieved of their share of the expenses and the purchaser would have been bound to pay Mr. *Watt* the expenses incurred to him on behalf of the trustees with reference to the transfer.

I think, therefore, that Mr. *John Watt*, Jun., was the agent for the trustees, for the sale of the houses in question. That being so, I think there can be no doubt of the law to be applied to the case. It has been so fully stated by the noble and learned Lord on the woolsack that it is unnecessary for me to do more than to say that I quite concur in the views which have been expressed.

Judgment of the House:—Ordered and Adjudged, That the interlocutor of the Lords of Session in *Scotland*, of the First Division, of the 2nd of March, 1877, complained of, be, and the same is hereby reversed, and that the cause be, and the same is hereby remitted back to the Court of Session in *Scotland*, with directions to reduce, decern, and declare in terms of the conclusions of the summons for reduction: And it is further Ordered, That the Respondents do repay to the Appellants any costs paid by them under the interlocutor of the 2nd of March, 1877, appealed from: And it is further Ordered, That the Respondents do pay to the Appellants the costs incurred by them in this appeal.

Agents for the Appellants: *Simson, Wakeford, & Simson.*
Agent for the Respondents: *R. M. Gloag.*

[HOUSE OF LORDS.]

SIMPSON AND COMPANY *et al.* . . . . APPELLANTS;
THOMSON, BURRELL *et al.* . . . . . RESPONDENTS.

H. L. (Sc.)
1877
Dec. 13.

Collision of two Ships—One lost—Both belonging to the same Owner—Claims of Underwriters and Others—17 & 18 *Vict. c.* 104, *and* 25 & 26 *Vict. c.* 63.

There is no independent right in underwriters to maintain in their own name, and without reference to the person insured, an action for damage to the thing insured.

Although the underwriters have paid for a total loss, and are entitled to all the rights in the injured ship which belong to its owner, yet if that owner cannot assert a right for damages against the wrongdoer, neither can the underwriters.

Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, and then claimed to rank *pari passu*, with the owners of cargo destroyed, in the distribution of the fund lodged in Court by the owner as proprietor of the ship which did the damage:—

Held (reversing the decision of the Court below), that the underwriters had no such right under the circumstances of the case.

Per THE LORD CHANCELLOR (1):—The underwriters' right must be asserted in the name of the person insured, but if he be the person who has caused the damage, the right cannot be maintained against himself.

Per LORD PENZANCE:—The underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, as he himself had no such right, inasmuch as, being the owner of both vessels, any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law.

ON the 4th of February, 1876, the steamship *Dunluce Castle*, on her passage from *London* to *Leith*, when near *Lowestoff*, was run down, and destroyed, by the steamship *Fitzmaurice*. Both vessels belonged to the same owner, Mr. *William Burrell*, of *Glasgow*.

Under the Mercantile Shipping Acts (2) Mr. *Burrell* petitioned the Court to limit his liability, as owner of the *Fitzmaurice*, to those who had suffered by the collision, to a sum of £3590; equalling the value of the ship in fault at £8 per ton.

(1) Lord *Cairns*.

(2) 17 & 18 Vict. c. 104, s. 514, and 25 & 26 Vict. c. 63, s. 54.

H. L. (Sc.) 1877 SIMPSON v. THOMSON.

The Respondents (other than *Burrell*) are underwriters, who having insured the *Dunluce Castle*, had paid Mr. *Burrell*, as the owner, under two time policies effected by him, £6000 as for a total loss. For this sum they claimed to rank with Messrs *Simpson & Co.*, owners of cargo lost; and the other claimants, upon the fund of £3590. The First Division of the Court of Session, on the 24th of November, 1876, pronounced the following interlocutor:

Find that the Petitioner is liable, in respect of the collision mentioned in the petition, for the sum of £3590 8*s.*, with interest thereon at the rate of four per cent. per annum from the 4th February, 1876, till the date of consignation, and limit the liability of the Petitioner, as owner of the steam-ship *Fitzmaurice*, in respect of said collision accordingly; repel the claim made by the Petitioner, *and rank and prefer the whole other claimants pari passu on said fund, and appoint a state or scheme of division of said fund to be lodged by the Petitioner, shewing the amount due to each claimant in respect of the above findings:* Find the Petitioner liable to the claimants in the expenses of this process, *except such expenses, if any, as have been solely occasioned by the discussion between the claimants Thomas Thomson and others, and Simpson & Co. and others; and with regard to the said last-mentioned expenses, find the said Simpson & Co. and others liable to the said Thomas Thomson and others* (1).

This interlocutor was confirmed on the 10th of March, 1877, the Court repelling the objection made by the Appellants *Simpson & Co.*, that the underwriters were not entitled to rank *pari passu* with them.

On appeal to the House—

Mr. *Watkin Williams*, Q.C., and Mr. *J. C. Mathew*, contended for the Appellants, that the Respondents the underwriters had no claim to rank *pari passu* on the fund, their rights being subordinate to, and dependent on those of the assured *Burrell*, who could not have maintained the claim, because any right of action he had must be a right of action against himself, which was an absurdity. Underwriters had to sue for damages in the name of the insured: *North of England Insurance Association* v. *Armstrong* (2). The cases also cited were *Miller* v. *Woodfall* (3); *Dixon* v. *Sadlier* (4); *Randal* v. *Cockran* (5).

Mr. *Benjamin*, Q.C., and Mr. *E. Clarkson*, contended for the

(1) Scotch Cases, 4th Series, vol. iv., p. 177.
(2) Law Rep. 5 Q. B. 244.
(3) 8 E. & B. 493.
(4) 5 M. & W. 405, 413.
(5) 1 Ves. Sen. 97.

Respondents, that the judgment of the Court below was correct. It was clearly laid down in the *North of England Insurance Association* v. *Armstrong* (1) that the underwriters, on a payment for a total loss, acquired a right to whatever could be recovered against the owners of the vessel in fault. This rule followed the principle laid down in *Stewart* v. *Greenock Marine Insurance Company* (2). The underwriters obtained all the shipowners' rights at the moment of the collision: *Davidson* v. *Case* (3); Lord President's opinion (4); *Phillips* on Insurance (5). The fact of both ships being owned by the same person did not exempt the fund from liability to the Respondents. According to commercial law ships were personified, and being away from the owner's control, the underwriters took the place of the owner of the *Dunluce Castle*, thus making the owner of the *Fitzmaurice* a stranger. The underwriters had an inchoate interest in the ship before the loss, and independent of it; and had such an interest in the ship's welfare and protection as would support an action by them in their own name and behalf against any wrongdoer. Had the ships been owned by different persons, the underwriters would have been entitled to rank against the fund, and this right could not be affected by the accidental circumstance that both ships belonged to the same owner. They also cited *McKenzie* v. *Whitworth* (6).

Mr. *Watkin Williams* was heard in reply.

The following opinions were delivered by the Law Peers (7).

THE LORD CHANCELLOR (8):—

My Lords, Mr. *Burrell*, as the owner of the *Fitzmaurice*, the vessel that was in fault, and admitting his liability, petitioned the Court of Session, under the Merchant Shipping Acts (9), to stop all actions instituted against him, paying into Court the sum of £3590, being the tonnage liability fixed by the statute, and leaving

(1) Law Rep. 5 Q. B. 244.
(2) 2 H. L. C. 159; 1 Macq. 328.
(3) 8 Price, 542; 5 Moo. 116.
(4) Scotch Cases, 4th series, vol. iv. p. 180.
(5) Vol. ii. p. 382, 383.
(6) 10 Ex. 142.
(7) Having been revised by their Lordships in print.
(8) Lord *Cairns*.
(9) 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63, s. 54.

H. L. (Sc.) 1877

SIMPSON v. THOMSON.

those who had any claim or right of action against him to establish it against that sum.

In the proceedings consequent on *Burrell's* petition the Appellants, as owners of the cargo on board the *Dunluce Castle*, made and established a claim against the fund, as did also the master and seamen of the ship, in respect of their effects lost in the collision, and the underwriters also made a claim on the ground that they had paid £6000 to *Burrell* under the two insurances on the *Dunluce Castle* as upon a total loss, and ought to rank as creditors against the fund *in medio* for that amount.

The Appellants resisted the right of the underwriters to share in the distribution of the fund; but the Court of Session by the interlocutors (1) under appeal have sustained the right of the underwriters, and your Lordships have now to say whether that decision is correct.

My Lords, I ought in the first place to state that in my opinion the question must be considered just as if the underwriters had brought an action against *Burrell*. It is true that under the Merchant Shipping Acts all actions against *Burrell* have been restrained, and a limited sum of money has been paid into Court to answer rateably, as far as it will suffice, the claims of all persons who have brought, or might bring actions against him. But the Merchant Shipping Acts do not profess to create any new right. On the contrary, they act in restraint of existing rights, substituting merely a limited for an unlimited liability. The question must be looked at, therefore, in the same way as it would be if, all other things remaining the same, the underwriters were not in competition with any other claimants, but were suing *Burrell* for damages on the ground that his ship, the *Fitzmaurice*, had through careless navigation run down his other ship the *Dunluce Castle*, upon which, they, being the insurers, had paid as for a total loss.

My Lords, the learned counsel who argued this case at your Lordships' bar on behalf of the Respondents could not suggest that such an action had ever been brought, nor could they point out in any text book or in any decided case, any authority that such an action could be maintained.

(1) Scotch Cases, 4th Series, vol. iv. p. 177.

In order, however, to determine whether such an action could be maintained it is necessary to ascertain the principle upon which the underwriters, having paid as upon a total loss, are held to succeed to whatever can be recovered in respect of the thing insured.

The Lord President (1) states this principle thus:

It is necessary to consider very particularly what is the effect of a total loss, either actual or constructive, as in a question between the owners and the underwriters of the lost vessel. There can be no doubt that whether the loss be actual or constructive, if it be a total loss, the property of the sunk vessel passes to the underwriters. And it is also quite settled that all the incidents of that property pass with it. But it is necessary to go a little deeper than that general statement of principle, in order to see what is the precise relation of the underwriters and the owners after the property of the vessel has so passed from the one to the other. It is quite clear that in any transference either of an heritable subject or of a corporeal moveable by voluntary conveyance, nothing passes as an incident of the subject of the nature of a claim of damages. The disponee of an heritable subject, or the purchaser of a corporeal moveable, takes it just as it stands at the time of the conveyance, with, of course, all the incidental rights belonging to it as a piece of property; but it is quite clear that in such a case a claim of damage for injury done to that property before transference takes place could never pass along with the conveyance of the subject. Now it is quite settled that in that kind of vendition which takes place by the operation of law, when the underwriter pays the contents of his policy upon a sunk ship, a claim of damages against a vessel which has caused the loss of the ship by collision does pass along with the property of what remains of the vessel; and therefore it is quite obvious from that consideration alone, without going any further, that the transference which is operated by force of law when the underwriter pays under his policy upon the lost ship is something quite different from an ordinary voluntary conveyance of a corporeal moveable.

And further on, the Lord President continues thus:

Then, is it to be said that when the property of the sunk vessel has passed to the underwriters with all its incidents, including the right to claim against the offending ship for the damage done by the collision, is it to be said that the owner of the offending vessel shall escape from this liability because he was also owner of the sunk ship? I confess I am quite unable to see any ground in law for holding that. It seems to me, on the contrary, to be quite clear that the operation of the legal assignment of the ship from the owner to the underwriters is to carry with it all the rights which would have belonged to any owner of that vessel, no matter who he might be; and as soon as by that legal assignment the owner of the offending ship ceased to be owner of the *Dunluce Castle* there was no longer any identity of persons between the party who makes the claim and the party who is liable to satisfy the claim. That identity is put an end to by the operation of

(1) Scotch Cases, 4th Series, vol. iv. p. 179.

H. L. (Sc.) 1877 SIMPSON v. THOMSON.

law, and therefore I think that the underwriters in these circumstances would have a perfectly good ground for action against the owner of the *Fitzmaurice* to make good the damage caused by the collision.

The view of the Lord President, therefore, appears to be, that after payment by the underwriters as on a total loss, there is effected, by some independent operation of law, a transfer of whatever, if anything, can be recovered in specie of the thing insured, and that there is also created by a similar operation of law, and by reason of the transfer of the thing insured, an independent right in the underwriters to maintain in their own name, and without reference to the person insured, an action for the damage to the thing insured, which was the cause of the loss.

My Lords, speaking with great respect for the Lord President, and the other learned Judges who followed his opinion, I feel bound to say I am not aware of any authority for the view of the case thus taken by him. The case cited by him of *The North of England Insurance Company* v. *Armstrong* (1) does not appear to me to touch the question. The reasoning of the Lord President would be inapplicable to the case of a partial loss; and yet no one would dispute the right of underwriters, after paying to *A.* on a partial loss occasioned to his ship by the collision of the ship of *B.*, to sue *B.* if his ship was in fault. I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrong-doer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name but in the name of the person insured, and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all.

The case of *Yates* v. *Whyte* (2) involved questions analogous to

(1) Law Rep. 5 Q. B. 244. (2) 4 Bing. N. C. 272.

and, as it seems to me, decisive of the present. The Plaintiff was there suing the Defendants for damaging his ship by collision, and the Defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the Plaintiff by his insurers in respect of such damage; and if the insurers had possessed an independent right of action against the Defendants, the Defendants might no doubt have been right in their contention. I think it desirable to read to your Lordships what was said by some of the learned Judges in that case. Chief Justice *Tindal* says (1):—

I think this case is decided in principle by that of *Mason* v. *Sainsbury* (2). There, a party whose property had been burnt by a mob, was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute 1 Geo. 1 for the benefit of the insurers. The only distinction between that case and the present is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that a recovery upon a contract with the insurers is no bar to a claim for damages against the wrongdoer. Lord *Mansfield* says: "Though the office paid without suit this must be considered as without prejudice, and it is, to all intents, as if it had never been paid. The question comes to this, Can the owner of the house, having insured it, come against the hundred under this Act? Who is first liable? If the hundred be first liable it makes no difference. If the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an *indemnity*. We every day see the insured put in the place of the insurer. In abandonment it is so; and the insurer uses the name of the insured. It is an extremely clear case. The Act puts the hundred in the place of the trespassers; and on principles of policy, I am satisfied it is to be considered as if the insurers had not paid a farthing." That the insurers may recover in the name of the assured after he has been satisfied appears from *Randal* v. *Cockran* (3), where it was held that they had the plainest equity to institute such a suit. Such, therefore, is the situation of the underwriters here, that this case has received its answer from it. If the Plaintiff cannot recover, the wrongdoer pays nothing, and takes all the benefit of a policy of insurance without paying the premium. Our judgment must be for the Plaintiffs.

Mr. Justice *Park* says (4):—

I am of the same opinion. This point has been decided ever since the time of Lord *Hardwicke;* so much so that it has been laid down in text-writers, that where the assured, who has been indemnified for a wrong recovers from the wrongdoer, the insurers may recover the amount from the assured. In *Randal* v. *Cockran* it was said they had the clearest equity to use the name of

(1) 4 Bing. N. C. 282.
(2) 3 Douglas' Rep. 61.
(3) 1 Ves. Sen. 97.
(4) 4 Bing. N. C. 283.

H. L. (Sc.) 1877 SIMPSON v. THOMSON.

the assured, in order to reimburse themselves; and in *Mason* v. *Sainsbury* (1) the Judges were all unanimous; they held, indeed, that the insurers could not sue in their own names, but they confirmed the general doctrine that the wrongdoer should be ultimately liable, notwithstanding a payment by the insurers.

Mr. Justice *Vaughan* says (2):—

No case has been cited which establishes the point contended for on behalf of the Defendants, while *Randal* v. *Cockran* and *Mason* v. *Sainsbury* are in point for the Plaintiff. In *Mason* v. *Sainsbury* it was argued as here, that the Plaintiff having received his indemnity from the insurers, could not recover a second time from the hundred; but Lord *Mansfield* said: "Who is first liable? If the hundred be first liable, still it makes no difference; if the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an *indemnity*. We every day see the insured put in the place of the insurer." And in *Clark* v. *The Hundred of Blything* (3), the authority of *Mason* v. *Sainsbury* was expressly recognised by Lord *Tenterden*.

My Lords, these authorities seem to me to be conclusive that the right of the underwriters is merely to make such claim for damages as the insured himself could have made, and it is for this reason that (according to the English mode of procedure) they would have to make it in his name; and if this is so, it cannot of course be made against the insured himself.

It may be said that this view of the law inflicts considerable hardship upon the underwriters. I am not, however, satisfied that this is the case. Either the policy by which the underwriters are bound is an insurance against perils of the seas arising from the negligent navigation of any other vessel, even although that vessel belong to the person insured, or it is not. If it is not an insurance against such a peril of the sea, the underwriters should defend themselves accordingly, and decline to pay for the loss. If, on the other hand, the insurance is a contract to indemnify against the consequences of the negligent navigation of any other ship of the insured, it would be little short of an absurdity that the underwriters should in the first place indemnify the insured for the consequences of that negligent navigation according to their contract, and immediately afterwards recover the amount back from the insured as damages occasioned by this negligent navigation.

(1) 3 Douglas' Rep. 61. (2) 4 Bing. N. C. 283.
(3) 2 B. & C. 254.

I must, therefore, move your Lordships that the interlocutor of the 24th of November, 1876, be varied, by inserting after the words "rank and prefer the whole of the other claimants," the words "other than the underwriters," and by inserting a finding that the underwriters, *Thomas Thomson* and others, are jointly and severally liable to the Appellants, *Simpson & Co.* and others, with regard to the expenses occasioned by the discussion between the claimants *Thomas Thomson* and others, and *Simpson & Co.* and others; and that the interlocutor of the 10th of March, 1877, should be reversed, with a declaration that the objections for *Simpson & Co.*, and *Henderson, Hogg, & Co.*, ought to have been received.

LORD PENZANCE:—

The facts which give rise to the question in this case are undisputed, and are these: Mr. *Burrell* was the sole owner of two vessels, the *Dunluce Castle* and the *Fitzmaurice*, which came into collision at sea. The collision was due entirely to the negligence of those in charge of the *Fitzmaurice*, and the result of it was that the other vessel (the *Dunluce Castle*) and her cargo were wholly lost. Mr. *Burrell*, as owner of the ship in fault, instituted this suit, under the provisions of the Mercantile Shipping Acts, for the purpose of limiting his liability to those who had suffered by the collision to a sum equalling the value of the ship in fault, calculated at £8 per ton, and has paid into a bank under order of the Court that sum to be distributed by the Court among those entitled to it.

The Respondents are underwriters who had insured the vessel which was sunk (the *Dunluce Castle*), and who have paid Mr. *Burrell*, as the owner of that vessel, under a valued policy effected with them by him, the sum of £6000 as for a total loss. For this sum they have claimed to rank with the other claimants upon the fund in Court, and the question is whether they are entitled to do so. The Court below have affirmed their right, and allowed the claim; and it is from that decision that the present appeal is brought.

As the claim thus put forward is made under the provisions of the statutes above referred to, I will call attention to those pro-

H. L. (Sc.) 1877 SIMPSON v. THOMSON.

visions. The 25 & 26 Vict. c. 63, s. 54, provides "that the owner of any ship shall not (except in cases of their actual fault or privity) be *answerable in damages* in respect of loss or damage to ships or goods," in an amount exceeding £8 per ton of the ship doing the injury. And the statute 17 & 18 Vict. c. 104, s. 514 (which is incorporated with the last-mentioned Act), provides that "in cases where any liability is alleged to have been incurred by any owner" in respect of injuries to ships or goods, &c., "and several claims are made or apprehended," a suit may be instituted by such owner "for the purpose of determining the amount of such liability and for distribution of such amount rateably among the claimants."

From these provisions it is, I think, clear that no claim upon the fund can properly be made except in respect of some "liability" of the owner to the claimant by reason of an injury or wrong for which the owner would be "answerable in damages" to the person claiming. And accordingly the objection made to this claim by the Appellants is that the underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, except such, if any, as they may have derived from the owner of the lost ship in whose place they may claim to stand; and that he himself had, and could have no such right of action, inasmuch as being the owner of both vessels, any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law.

In answer to this objection it seems to have been considered by the Court below that by the payment of a total loss and the cession or transfer to the underwriters of the vessel (or whatever might remain of her) which followed thereupon by operation of law; some new right of action sprung up, or was created, against the owner of the wrong-doing ship in favour of the underwriters.

I say "new" right of action, because the right of action contemplated is something different from, and other than, the right of action which resided in the owner of the injured ship, the benefit of which could only be made available to the underwriters by transference from that owner, and consequently could only be insured in his name.

My Lords, I entirely agree with the reasoning of the Lord

Chancellor upon this head, and am of opinion that there is no warrant to be found in the existing decisions for such a proposition.

But in the argument at your Lordships' Bar the learned Counsel for the Respondents took their stand upon a much broader ground. They contended that the underwriters, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract; and that this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

This, I say, is the principle involved in the Respondents' contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a

H. L. (Sc.) 1877 SIMPSON v. THOMSON.

term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

My Lords, I have given these illustrations because I fail to see any distinction in principle between them and the right asserted by the underwriters in the present case; and if I am right in so regarding them, they shew at least how much would be involved in a decision by your Lordships whereby that right should be affirmed.

But the ground upon which I will ask your Lordships to reject this contention of the Respondents' counsel is this—that upon the cases cited no precedent or authority has been found or produced to the House for an action against the wrongdoer except in the name, and therefore, in point of law, on the part of one who had either some property in, or possession of, the chattel injured. On the other hand, the existence of authorities in which the suit has been brought in the name of the owner, though for the benefit of persons having a collateral interest, is somewhat strong to shew that such persons had no right of action in themselves. For it is to be presumed that a person having such a right would pursue it directly, and not indirectly through the name of another.

The observations of Lord *Mansfield*, in the case of *Mason* v. *Sainsbury* (1), which was an action against the hundred for damage done to the petitioner's property, the value of which underwriters had already paid, throw some light on the subject:

> If the insurers be first liable, then payment to them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of a contract of insurance. It is an indemnity. We see every day the insurer put in the place of the assured. In abandonment it is so, and the *insurer uses the name of the assured.*

Chief Justice *Tindal* quotes this language in the case of *Yates* v. *Whyte* (2), and adds:

> That the insurer may recover *in the name of the assured* after he has been

(1) 3 Douglas' Rep. 61. (2) 4 Bing. N. C. 283.

satisfied appears from *Randal* v. *Cockran* (1), where it was held that they had the plainest equity to institute such a suit.

And in the same case Justice *Park* (2) said:

This point has been decided ever since the time of Lord *Hardwicke*, so much so that it has been laid down in text-writers that when the assured, who had been indemnified for a wrong, recovers against the wrongdoer, the insurer may recover the amount from the assured. In *Randal* v. *Cockran* (3) it was said they had the clearest equity to *use the name of the assured* in order to reimburse themselves, and in *Mason* v. *Sainsbury* (4) the Judges were all unanimous; they *held, indeed, that the insurers could not sue in their own names*, but they confirmed the doctrine that the wrongdoer should be ultimately liable notwithstanding a payment by the insurers.

A question was raised in the course of the argument at your Lordships' bar, whether the underwriters could have defended themselves against an action brought on the policy by Mr. *Burrell*, on the ground that the loss was occasioned by a ship which belonged to himself and was navigated by his agents and servants. The solution of this question, whichever way it be solved, does not seem to me to advance the claim now made by the underwriters. If they had a good defence against Mr. *Burrell's* claim they were bound to avail themselves of it, and thus throw the loss upon Mr. *Burrell*, instead of paying him and claiming to throw the loss on the other creditors of the distributable fund. If, on the other hand, they had no such defence, I fail to see how that circumstance has any bearing upon or in any degree improves their position in the claim they now make.

In the result, therefore, I submit to your Lordships that the only liabilities in respect of which Mr. *Burrell* paid the fund into Court under the statute were those for which he was answerable in damages; and that, as he could not be answerable in damages to himself, no claim ought to be allowed against the fund in respect of any right derived from him and enforceable only in his name; while on the other hand the underwriters have produced no authority or even judicial *dictum* for the proposition that in their own right, and independently of Mr. *Burrell* in his character of assured, they could have sued him for damages in his character of owner of the *Fitzmaurice;* and for these reasons I concur in

(1) 1 Ves. Sen. 97.
(2) 4 Bing. N. C. 283.
(3) 1 Ves. Sen. 98.
(4) 3 Douglas' Rep. 61.

H. L. (Sc.) 1877

SIMPSON v. THOMSON.

all respects in the motion placed before the House by the noble and learned Lord on the woolsack.

LORD BLACKBURN:—

My Lords, I have had the advantage of reading the opinion of the noble and learned Lord who spoke last in this case, in which I completely agree. But as the Judges in the Court below have given a judgment the other way, I think the respect which I sincerely feel for their authority makes it proper to say why I dissent from their reasoning, or, in other words, to point out what seems to me the fallacy in the judgment in the Court below.

My Lords, I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid. The right to receive payment of freight accruing due but not earned at the time of the disaster is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property, just as it would have passed to a mortgagee of the ship who before the freight was completely earned had taken possession of the ship: see *Keith* v. *Burrows* (1). This is at times very hard upon the insured owner of the ship; he can, however, avoid it by claiming only for a partial loss, keeping the property in himself, and so keeping the right to earn the accruing freight. In such a case he recovers an indemnity for the amount of the loss actually sustained, in calculating which all the benefits incident to the property retained by the shipowner must be considered.

But the right of the assured to recover damages from a third person is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle. And on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes. This will appear clear if we suppose that the owner of the *Dunluce Castle* had in this case been a different person from Mr. *Burrell*,

(1) Law Rep. 2 Ap. Cas. 636.

and that the *Dunluce Castle*, instead of being totally sunk, had only been injured to the extent of 50 per cent. of her value. The owner of the *Dunluce Castle* would have had a right of action to recover that 50 per cent. from Mr. *Burrell*, not because he was the owner of the *Fitzmaurice*, but because he was the master of the captain and crew whose negligence in the course of their employment occasioned the damage. The underwriters could not resist payment of an indemnity to the owner of the *Dunluce Castle* on the ground that he had a remedy over against Mr. *Burrell*, but they would have had a right, if he had already recovered something from Mr. *Burrell*, to have that considered in settling what that indemnity should be; or, if he had not yet recovered from Mr. *Burrell*, they would, on the principle laid down in *Randal* v. *Cockran* (1), have a right to get what they could from Mr. *Burrell* in order to recoup themselves.

Mason v. *Sainsbury* (2) and *Yates* v. *Whyte* (3) were both cases of partial loss only. The right of the underwriters could not arise in those cases by relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity.

In *England*, the action must be in the name of the shipowner, not of the underwriters. I think this material, as shewing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters. In other systems of jurisprudence, or it may be in our own as altered hereafter, the assignee of such a right may be able to sue in his own name. The important question will still remain: Is it a transfer of a right of action, which cannot be transferred unless it already exists; or a fresh right created? The whole reasoning of the Court below is applicable to the case of a total loss, and of a total loss only. It would not be applicable to the case of a partial loss of 99 per cent. or even more. I think, however, the reason of the law is not more applicable to those who have indemnified for a total loss than to those who have indemnified for a partial one.

(1) 1 Ves. Sen. 98. (2) 3 Douglas' Rep. 61. (3) 4 Bing. N. C. 272.

H. L. (Sc.) 1877 ~~ SIMPSON v. THOMSON.

I have only further to observe, that if the law had been that the owners of a ship were to be treated as a *quasi* corporation, and so the owners of the *Dunluce Castle* had had a right of action for damages against the owners of the *Fitzmaurice*, irrespectively of whether some or the whole of the shareholders in the two *quasi* corporations were identical, the case would have been quite different. But such is not the law; and the Legislature in the Acts now in consideration did not intend to give any right of action for damages which did not exist before, but only to limit the amount recoverable under the existing law.

I think that the question, whether the underwriters had or had not a defence against any action on the policy of Mr. *Burrell*, does not arise, and I prefer to say nothing about it.

LORD GORDON:—

My Lords, this case is attended with some difficulty; but having given it that anxious consideration to which the opinions of the very learned Judges in the Court of Session are so well entitled, I have come to the opinion that the appeal must be sustained. I have had the advantage of seeing and considering the opinions which have been delivered by your Lordships, and I concur in that of your Lordship on the woolsack. It is unnecessary, therefore, that I should detain your Lordships by any lengthened remarks.

The discussion arises with reference to a fund which is of limited amount, and beyond which there is no liability against the person who has provided the fund, viz., the owner of the *Fitzmaurice*, which was the vessel doing the injury to the *Dunluce Castle*, in respect of which all the claims arise. There are several claimants on the fund, in particular the owners of the cargo which was on board of the *Dunluce Castle* at the time she was injured, and the underwriters on that vessel. The fund is insufficient for payment in full of all the claims, and the owners of the cargo object, and are entitled to object, to the right of these underwriters to rank on the fund. The peculiarity in the case is that the same person is the owner of both ships—both the ship which was sunk and that which did the injury. If the ships had belonged to different owners, I think there can be no doubt that in such a case as here

occurs, viz., a case of a total loss, the underwriters would have been entitled, as in right of the owner of the injured ship, to vindicate a claim of damages against the owner of the vessel which had caused the damage, and to participate in the fund *in medio* which forms the measure of the offending shipowner's liability under the Merchant Shipping Acts. But that is not the case with which your Lordships have to deal; and you must consider the case on the facts as they arise, viz., that the same person was the owner of both ships.

I think there is nothing peculiar to Scotch law in the case, the systems of both countries in regard to marine insurance being the same, and the provisions of the Merchant Shipping Acts applying equally to both.

The view which I take of the case is a very short one, and it is this: I think the case must be looked at as if the owner of the *Dunluce Castle* had not been insured. His having effected insurances was a very proper and prudent act, but he did it for his own benefit, and the underwriters cannot complain that they have had to meet the risk against which they insured. Now I think it is clear that if the owner of the *Dunluce Castle* had not been insured he could have had no claim against himself as the owner of the *Fitzmaurice*, which caused the injury to the *Dunluce Castle*. The injury to that ship was substantially caused by its own owner, and he could not be liable to himself for the damage so caused. And if he could not be liable to himself, he could not assign any right, either expressly or by implication of law, to any third person, as he had none to convey. No doubt the rights of underwriters are well established, and it is one of these that on payment of the risk as for a total loss they are entitled to all the rights in the injured ship which belonged to its owner; but they are not entitled to more. And if the owner of the *Dunluce Castle* had no right to sue the owner of the *Fitzmaurice*, neither can the underwriters on the *Dunluce Castle*, whose rights were derived from the owner of that vessel.

I therefore concur in the judgment which your Lordship on the woolsack proposes.

Judgment of the House:—Ordered and Adjudged, That the Interlocutor of the Lords of Session in *Scotland*, of the First

H. L. (Sc.)
1877
SIMPSON
v.
THOMSON.

Division, of the 24th of November, 1876, complained of in the appeal, be, and the same is hereby varied by inserting therein, after the words, "rank and prefer the whole other claimants," the following words, "other than the underwriters;" and that the underwriters, *Thomas Thomson* and others, are jointly and severally liable to the Appellants, *Simpson & Co.*, *Henderson, Hogg, & Co.*, and *William Dixon*, with regard to the expenses occasioned by the discussion in the Court of Session between the claimants, *Thomas Thomson* and others, and *Simpson & Co.*, *Henderson, Hogg, & Co.*, and *William Dixon:* And further Ordered and Adjudged, That the interlocutor of the Lords of Session, of the First Division, of the 10th of March, 1877, also complained of in the appeal, be reversed: And it is Declared, That the objections for *Simpson & Co.*, and *Henderson, Hogg & Co.*, ought not to have been repelled; and with this declaration, It is Ordered, That the cause be remitted back to the Court of Session in *Scotland*, to do therein as shall be just and consistent with this variation, finding, declaration, and judgment: And it is also further Ordered, That the Respondents, the underwriters, do pay or cause to be paid to the Appellants the costs incurred by them in respect of the appeal to this House.

Agents for the Appellants: *Waltons, Bubb, & Walton.*
Agents for the Respondents: *Grahames & Wardlaw.*

[HOUSE OF LORDS.]

THE EARL OF PERTH AND MELFORT . APPELLANT;
LORD ELPHINSTONE *et al.* . . . . . RESPONDENTS.

H. L. (Sc.)
1877
Dec. 13.

Entail—Royal Charter by Progress—Act 1690, *c.* 33.

A royal charter, not original, but by progress, and unrecorded, held not to have given substitute heirs of entail the benefit of the Act 1690, c. 33, which would otherwise have saved them from the penalties of their predecessor's treason (1).

Per THE LORD CHANCELLOR (2): The Appellant founds on the Crown charter that followed the procuratory of resignation, and he argues that this is to be looked at as a fresh grant from the Crown, and that as it contains a clause shifting the estate upon the treason of any holder to the next in succession, he can get rid of the consequence of the attainder without resorting to the Act of 1690. Speaking for myself, I should have required much stronger authority than any which was produced to satisfy me of the validity of such a clause: for I entirely agree with the learned Judges of the Court of Session that the charter of 1687 was not, and was not intended to be, an original royal grant.

PURSUANTLY to a procuratory of resignation dated the 11th of October, 1687, the Crown issued a charter on the 17th of November, 1687, regranting the *Perth* estates to the Appellant's ancestor, *James Drummond*, fourth Earl of *Perth*, in strict entail "to and in favour of the heirs male of his body; whom failing, to his other heirs male whatsoever; whom all failing, to his own heirs and assignees whomsoever." This charter was not recorded in the register of entails.

In 1746, *James*, third Duke of *Perth*, then in possession of the estates, and the apparent heir his brother *John*, neither having issue, were both attainted of high treason, and the forfeited *Perth* estates were on the 5th of August, 1785, granted to Captain *John Drummond* in fee simple. He dying in 1800, the property went to his daughter; who married Lord *Willoughby D'Eresby*, and in 1862 conveyed the *Perth* estates to trustees, the above Respondents.

The Appellant now claimed the *Perth* estates, under the Royal

(1) For the original of this case see Law Rep. 2 H. L., Sc. 139, and the Third Series of the Scotch Cases, vol. vii. p. 651, containing a full detail of the *Perth* title.

(2) Lord *Cairns*.

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

Charter of the 17th of November, 1687, as the heir thereof duly served.

The Respondents on the other hand maintained that the Royal Charter relied upon by the Appellant was not an original grant from the Crown, but merely a charter by progress, following the procuratory of resignation, a charter which, not having been recorded in the register of tailzies, was insufficient, and ineffectual to support the Appellant's contention, regard being had to the Scotch statute of 1690, c. 33, of itself fatal to all claim on the part of substitute heirs, including the Appellant, the estates being by the forfeiture vested absolutely in the Crown (1).

The Lord Ordinary (2) dismissed the Appellant's action; holding that "whatever might be the effect of an original Crown grant in terms of the charter of 1687, that deed being a charter by progress, following upon and in terms of the procuratory of resignation, could not have the effect contended for by the Pursuer." Upon a reclaiming note the Second Division of the Court of Session adhered to the Lord Ordinary's interlocutor with costs (3).

On the appeal to the House *The Lord Advocate* (4) and Mr. *Horace Davey*, Q.C., with them Mr. *Low* of the Scotch bar, and Mr. *Erskine Pollock*, were heard for the Appellant, contending that the charter of the 17th of November, 1687, emanating from the sovereign, required no registration, and the benefit accruing to the Crown on attainder did not extend beyond the interests of the heir of entail involved in the rebellion and his issue male. It was not a charter by progress, but a new grant from the Crown of the lands which had been resigned by the procuratory into the king's hands. The following authorities were cited: *Stair's* Institutions, book 4, title 40, sect. 16; *Macdonald* v. *Macdonald* (5); *Nisbet* (Sir *John* of *Dirleton*), Decisions, 199; *Mackenzie*, Institute of the Laws of *Scotland*, 3, title 8, p. 197; *Erskine*, 2, title 3, sect. 20.

Mr. *Benjamin*, Q.C., and Mr. *Balfour* (of the Scotch bar) on

(1) Sandford on Entails, p. 142. See also case of *Gordon* v. *Lord Advocate*, Mor. 4728; 1 Paton, 508, 558.

(2) Lord *Young*.

(3) Scotch Cases, 4th Series, vol. ii. p. 538.

(4) Right Hon. *W. Watson*.

(5) 1 Bell's Sc. Ap. 819, 829.

behalf of the Respondents, were not called upon; the Law Peers having taken time to consider of their judgment, delivered ultimately the following opinions, which go fully into the facts, as well as the argument and merits of the case.

THE LORD CHANCELLOR (1):—

My Lords, in the year 1868 the present Appellant raised an action against the present Respondents, claiming the same estates which are claimed in the action out of which the present appeal arises. That litigation, after some interlocutors had been pronounced by the Court of Session, came before your Lordships' House, and was finally decided adversely to the Appellant on the 19th of June, 1871.

The Lord Ordinary, before whom the present case was first discussed, was of opinion that the whole of the claim of the Appellant in the present action was covered by what was decided in the former action, and was in fact *res judicata*. The Second Division of the Court of Session differed from the Lord Ordinary, in so far that they held that the whole of the claim of the Appellant was not *res judicata;* but they found that the *media concludendi* on which the present summons proceeds, in so far as the same differ, or are maintained to be different from those on which the former action was founded, are not relevant or sufficient to support the Appellant's title to call for production of the writs specified in the summons. The Lord Advocate, appearing for the Appellant at your Lordships' Bar, stated very distinctly the points which he considered were not concluded by the judgment in the former action; and the question comes simply to be one of relevancy; whether, taking those points, they are sufficient to support the Appellant's title.

The first point in the case of the Appellant arises in this way. In the former action he founded upon a deed of entail created by a procuratory of resignation, dated the 11th of October, 1687, by which *James*, fourth Earl of *Perth*, then Chancellor of *Scotland*, after reservation of his own life rent, disponed his lands and estates to and in favour of his eldest son, Lord *James Drummond*, and the heirs male of his body; whom failing to his other heirs male

(1) Lord *Cairns*.

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

whomsoever; whom all failing to his own heirs and assignees whomsoever; and he contended that in 1746, when Lord *John* was attainted, nothing passed to the Crown but the life interest of Lord *John Drummond* as an heir of entail, and that on his death the estates reverted to the heirs of entail nominated by the deed creating the entail, and that the Appellant was the nearest of these heirs of entail. This argument was founded on the Act of 1690, c. 33, which, it was said, introduced a privilege in favour of heirs of entail whereby forfeiture was not to go beyond the person attainted. To this argument, however, it was held in the former action to be a conclusive answer that by the words of the Act it was an essential condition that the entail of which the benefit was thus to be given to heirs substitute should be recorded in the register of entails, and the entail in question not having been so recorded, it was held that the Appellant could not claim the benefit of the Act of 1690 (1).

In order to avoid this difficulty the Appellant in the present action founds, not upon the Chancellor's own deed, the procuratory of resignation of the 11th of October, 1687, but on the Crown Charter that followed that procuratory of resignation, the date of which Crown Charter is the 17th of November, 1687, and he argues that this is to be looked at as a fresh grant from the Crown, and that as it contains a clause shifting the estate upon the treason of any holder to the next in succession, he can get rid of the consequence of the attainder without resorting to the Act of 1690.

If the charter of the 17th of November, 1687, had been an original royal grant, it would have become necessary for your Lordships to consider whether a clause in a grant from the Sovereign, even at that date, protecting the subject from the constitutional consequences of his attainder for high treason, could be valid; and, speaking for myself, I should have required much stronger authority than any which was produced to satisfy me of the validity of such a clause. But, my Lords, your Lordships are, I think, relieved from any difficulty which might attend the decision of that question; for I entirely agree with the Lord Justice Clerk and the other learned Judges of the Court of Session

(1) Law Rep. 2 H. L., Sc. 139.

that the charter of 1687 was not, and was not intended to be, an original royal grant. It is nothing more than a charter by progress. As Lord *Gifford* says:

> Its sole warrant is the procuratory of resignation which prescribes its terms. The Crown, like any other superior, will insert in a charter by progress any conditions which the owner pleases not affecting the superior's rights. The entail is never the act of the superior, but the act of the vassal or procurator, who alone has the right, if he chooses, to entail the lands in accordance with law. The clause of *novodamus* does not in the least alter the nature of the deed, but is merely inserted to meet the case of lost title-deeds, or of doubts as to validity of the title, and to form the foundation for a new and prescriptive right.

My Lords, this alone would be sufficient to dispose of the Appellant's case; for if he fails in separating the charter of 1687 from the procuratory of resignation, the entail must stand on the procuratory of resignation of the 11th of October, 1687, as to which it is *res judicata* by this House that the Appellant cannot claim under it, because the entail is not recorded.

But even supposing that the Appellant had escaped from this difficulty, he would have been met by another, and, as it appears to me, a fatal impediment in his way. Assume that the entail of 1687 is to stand upon the Crown charter of the 17th of November of that year, and assume also that the clause in the charter shifting the estates in the event of treason is a valid clause, what was the history of the title between 1687 and 1746, when the attainder of Lord *John Drummond* took place? The first destination of the entail was to *James Drummond*, the son of the Chancellor, and the heirs male of his body, and this destination is not fenced by prohibitory, irritant, or resolutive clauses. The institute *James* Lord *Drummond* was therefore left unfettered to dispone and contract debt as he thought proper. Availing himself of this liberty, *James* Lord *Drummond*, the fifth Earl, in 1713 executed a disposition of the estates in favour of his son *James*, reserving his own liferent; and in this disposition all the restrictions and fetters contained in the charter of 1687 were omitted. Again, in 1731, *James*, the third Duke of *Perth*, who was then in right and possession of the estates, expede a Crown charter of resignation and *novodamus* in favour of himself and the heirs male of his body, whom failing his other heirs and assigns whomsoever; and in this charter, again, on which infeftment duly followed, all

H. L. (Sc.) 1877 — EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

restricting and fettering clauses were omitted. The result is, that at the time of the rebellion of 1745, *James*, third Duke of *Perth*, stood in this way absolute and fee simple proprietor, unfettered and unrestricted, although there was a simple destination in favour of heirs male. He died without issue, his heir apparent being his brother *John*, who was attainted as on the 12th of July, 1746, and the right of the Crown to all the estates held by *John* in apparency has already been decided. This, again, is fatal to the case of the Appellant.

My Lords, although the printed documents connected with this case are voluminous, the questions upon which the title of the Appellant depends, and to which I have called your Lordships' attention, are capable of being stated in a few words, and are, in my humble opinion, entirely free from doubt. There was no difference of opinion in the learned Judges of the Court of Session; and after your Lordships had heard at your Bar the very able counsel on behalf of the Appellant, who advanced in support of the Appellant's case everything that could be said, your Lordships did not, I think, entertain any doubt as to the decision at which you ought to arrive. At the same time, looking to the importance of the case to the Appellant, and to the magnitude of the interests involved, you deemed it more fitting, after having carefully heard the Appellant's case, to examine minutely and carefully the documents, the pleadings, and the judgments in the Court below. Your Lordships have now done this, and I believe that in none of your Lordships' minds does there exist any doubt —none, certainly, exists in mine—but that the interlocutor of the Court of Session must be affirmed. I accordingly move your Lordships to that effect, and that this appeal be dismissed with costs.

LORD O'HAGAN:—

My Lords, in this case, notwithstanding the well considered decision of your Lordships, in 1871, between the same parties and with reference to the same subject matter, it is not disputed that the Appellant may maintain his present claim, if he can shew that it is made on grounds substantially different from those on which he before relied; or, in the Scotch phrase, if the *media concludendi*

in the present action are not the same as were the *media concludendi* in the former. In that action, the Appellant insisted that he was the lawful heir of entail to the *Perth* estates under a procuratory of resignation of the 11th of October, 1687, by the Earl of *Perth* who was Chancellor of *Scotland*, which was followed by a charter of resignation and of *novodamus* from the Crown and an instrument of sasine; and that the entail so created being strict and continuing in spite of anything that had occurred in the intervening time, those estates were his. Your Lordships, in 1871, held that the procuratory of resignation then presented as the deed of entail, never having been recorded in the register of tailzies, was not of force to prevent the absolute forfeiture of the estates to the Crown on the attainder of 1746, or to invalidate the grant under which the Respondents hold them.

The decision so made the Appellant can in no wise controvert; but he says he was mistaken in the reasons on which he formerly rested his pretensions, and that he should have relied, as he now does rely, not on the procuratory of resignation of 1687, but on the charter which followed it. He contends that an entail was created by that charter which did not need to be recorded, as it was an instrument emanating from the Crown, and constituted a grant beyond the operation of the statute of 1685.

There has been much argument on the effect of the charter of 1679 and the disposition of 1713 made in contemplation of the rebellion which occurred soon after. But the charter of 1679 has none of the qualities of a Scotch entail; it has no prohibitory, irritant, or resolutive clauses, and it also has not been registered. The deed of 1713 was made by *James*, Lord *Drummond*, in favour of his son *James*, Master of *Drummond*, under his power, which was absolute, to dispose of the estate in fee. It is not in form an entail; it has none of the restrictions or fetters of the instrument of 1687; and it was found effectual to prevent the apprehended forfeiture from affecting the Master of *Drummond*. The father was attainted for his acts in 1715, but the son succeeded, and his right to the estates was formally confirmed in 1718. His title was completed by a charter of 1731, followed by infeftment, which made the proprietor free from all fetters in 1745. The lands, by forfeiture, were vested in the Crown in 1746. That forfeiture was

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

established by legal decision and Act of Parliament, and under it, by royal grant, the Respondents derive their interest, which is not, confessedly, affected by any subsequent proceeding.

I think, therefore, that, so far, your Lordships may safely concur with the unanimous opinion of the Court of Session, and hold that the instruments of 1687 and 1713 do not help the Appellant, if the latter of them does not materially injure his case.

The stress of the contention has rested on the effect of the charter of 1687 as having created an entail by the Crown, and being therefore unaffected by the absence of record in the register of tailzies, which was fatal to his former case.

The Lord Ordinary held that a complete answer was given to the entire claim of the Appellant by the plea of *res judicata*—But the Judges of the Court of Session considered that it had been urged on new *media concludendi*, which, if valid, for his purpose, would have avoided the effect of that plea, and entitled him to recover. On some of the reasons on which they relied the judgment of the Lord Ordinary would appear to be maintainable; but they give others which would be effectual to defeat the claim, even though the plea of *res judicata* did not fully answer it.

If the charter of the 17th of November, 1687, following upon the procuratory of resignation, were to be taken as the instrument of entail, it would seem to be more than doubtful whether the same defect which, according to the decision of this House, nullified the effect of the procuratory of resignation as such an instrument, should not equally nullify the charter of resignation and *novodamus*. It was never put on record in the register of tailzies, and the Act of 1685, c. 22, seems large enough to apply even to a royal charter which creates an entail. In the absence of restrictive words, the policy and the terms of that statute would seem to warrant its application universally; and, if so, the want of the record would render the charter as inoperative for the Appellants' object as the procuratory; and the case would fall directly within the authority of your Lordships' decision in 1871.

But there is clearer ground, according to the law and practice of *Scotland*, for refusing to give to the charter an effect which was denied to the procuratory. A charter of resignation and *novo-*

damus is not an original grant by the Crown. It is only, in the legal language of *Scotland*, a charter by progress. Its provisions are not made by the sovereign *mero motu*, or of his spontaneous bounty. The subject, desiring to entail his estate, inserts in the procuratory of resignation freely, for his own purposes and on his own responsibility, any terms he chooses; and what is done subsequently by the charter only operates to feudalise the title. The terms prescribed by the vassal are accepted, as of course, by the Crown. The vassal has his lands, and deals with them according to his pleasure. The grant is his. The entail is his, although he obtains the consent of his superior. The procuratory in a case like this cannot be separated from the charter. The charter cannot be dealt with as if it stood alone. What the vassal asks the superior gives. What is mere affirmance cannot be dealt with as creation. The entail is the work of the subject, and the procuratory is the deed by which it is accomplished. The form of the charter is not material. Its origin is in the will of the vassal; its phraseology is shaped by him: its only effect is to give feudal force to the provisions he has dictated. The result is, that it cannot avail the Appellant to sustain a title for which the procuratory has been held to offer no foundation.

I do not trouble your Lordships by observations on the three Acts —the *Vesting Act* (1), the *Annexation Act* (2), and the *Restoration Act* (3)—which have been the subjects of much discussion. They would present a formidable obstacle to the Appellant's claim, if, on other grounds, it was not untenable, for they not only vest in the Crown the general powers which were exercised in making the grant which constitutes the Respondent's title, but deal expressly with the *Perth* estates as having been held in fee by the attainted nobleman, and as having been, as such, forfeited and annexed to the Crown. So far as statutes can operate in establishing or evidencing a title, they demonstrate that when the grant of the lands was made to "the heirs male of *John Drummond*" they were held in fee and not under entail. But it is not necessary for the contention of the Respondents to press this view of the case.

My Lords, I have briefly stated what I have been led to con-

(1) 20 Geo. 2, c. 41. (2) 25 Geo. 2, c. 41.
(3) 24 Geo. 3. c. 57.

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

sider as the effect of the arguments and authorities presented for your consideration. But the whole controversy as to the main question in the case is properly dealt with by Lord *Neaves* as a matter of conveyancing, and it is the tradition and usage of your Lordships' House not to differ without coercive reason from the conclusions of the Scottish Judges as to such a matter. I see no such reason here. The Judges have been unanimous on a point on which they are especially competent to determine, from local knowledge and experience, and you will not be disposed lightly to disturb their ruling.

In my opinion the Appellant is not entitled to claim the estates as heir of entail, and his appeal should therefore be dismissed with costs.

LORD BLACKBURN (1):—

My Lords, in this action the Appellant seeks, as heir male in general, of, 1, *James Drummond*, fourth Earl of *Perth* and Lord Chancellor of *Scotland;* 2, *James* Lord *Drummond*, eldest son of the Chancellor; 3, *James Drummond*, designated as Duke of *Perth;* 4, *James Drummond*, of *London;* and 5, of *James Drummond* Baron *Perth*, to recover large estates, formerly the patrimony of the Earls of *Perth*. The Defenders, who are in possession of the estates, are the trustees of the late Lady *Willoughby D'Eresby*, who was only daughter and heiress of *James Drummond* Baron *Perth*, who died in 1800. The estates had been under the *Restoration Act* (24 Geo. 3, c. 57) conveyed by the Crown to Baron *Perth*. The Appellant in 1868 brought a former action against the same Defenders, which was finally decided by this House in 1871. The first step which the Appellant had to take in both actions was to establish that the title of Baron *Perth* to those lands was such that on his death they did not pass to his daughter as his heir general, but passed to the heir male in general of one of the five parties, whose heir male in general the Appellant is. The first step was not the only difficulty; but in the former action the Appellant failed on it. The interlocutor affirmed in this House was in the following terms:

Find that the lands and estates claimed by the Pursuer in the present action,

(1) Revised by his Lordship in print.

and all rights connected therewith, were taken out of the *hereditas jacens* of *James Drummond* (designed third Duke of *Perth*), to whom the Pursuer has served heir, by means of the attainder of *John Drummond* apparent heir to the said *James Drummond*, and that the same became vested in the Crown: Find that the said estates formed the subject of enactments under the statutes 20 Geo. 2, c. 41, 25 Geo. 2, c. 41, and 24 Geo. 3, c. 57, set forth in the summons, but that these statutes confer no right on the Pursuer in reference to the said lands and estates: Find that, in these circumstances, the Pursuer has no right or title to insist in the conclusions of the present action, and dismiss the same and decern (1).

So far as that interlocutor goes it is conclusive, but it does not prevent the Appellant from setting up a fresh case. This in the present action he seeks to do. The interlocutor in the present action which is now brought by appeal before your Lordships is in the following terms:

'Find the *media concludendi* on which the present summons proceeds, in so far as the same bears or are maintained to be different from those on which the former action between the parties to the present process was founded, are not relevant or sufficient to support the Pursuer's title to call for production of the writs specified in the summons.

And the question now before your Lordships is, whether any of the new *media concludendi* are relevant or sufficient to support the Pursuer's title. I am of opinion that they are not, and that the interlocutor should be affirmed.

The contention of the Appellants is, I think, that though it was decided in the former action that the Crown professed to grant to Baron *Perth* the whole fee in those lands, yet that the Crown could not grant more than had been vested in the Crown by the attainder of *John Drummond;* and that though the former decision was that the whole was vested in the Crown, notwithstanding the tailzie created by the fourth Earl of *Perth,* Lord Chancellor, by the procuratory of resignation dated the 11th of October, 1687 (inasmuch as that tailzie was never recorded in the register of tailzies), yet that it is open to him to contend, and he does contend, that there was a different tailzie which did not require to be so recorded. And he, as I understand his pleadings, says first, that such a tailzie was created by the deeds prior in date to October, 1687. This was not relied on in the argument at your Lordships' Bar, and my difficulty is to understand what the point

(1) Scotch Cases, 3rd Series, vol. vii. p. 651.

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

is. The reasons given by the Judges below (1), at most length by Lord *Ormidale* and by Lord *Gifford*, and more briefly by the Lord Justice Clerk, are to my mind irresistible, not so much to prove that the Appellant's point is bad, as that there is no point at all on these earlier deeds.

But the contention most urged was that it was a mistake to consider the tailzie of 1687 as being a tailzie made by the fourth Earl a subject; that it was really a tailzie created by the charter of the 17th of November, 1687, and was to be treated just as if the then Sovereign, King *James* VII., of *Scotland* had *de novo* granted lands (part of the royal domain) to a subject; and it was argued that such a royal grant, if made with due prohibitions, would be an effectual tailzie, though not recorded; and, moreover, that the clause shifting the estate from any heir who might commit treason would be good in such a royal tailzie whatever it might be in a subject's tailzie.

Two answers are made to this, and if either is good it is quite unnecessary to inquire what would be the legal effect of such a royal grant.

My Lords, I think both answers are good.

First. This is not a royal grant *de novo* at all; but merely a charter by progress given by the superior to feudalize the settlement made by the vassal—a part of the necessary machinery to complete the tailzie made by the subject, not a fresh grant by the Crown. This is a subject much dependent upon Scotch conveyancing, on which none but a trained Scotch lawyer is entitled to give a decided opinion. But I believe it will be better, in order to satisfy the Appellant that his case has really been considered here, if for no other reason, to state what I conceive to be the principle, though I do it with diffidence.

In 1687 the system of feudal holdings was in full force in *Scotland*. The vassal held his land either direct from the Crown or from some subject superior. In either case, so long as he fulfilled the conditions of his grant, the vassal held the *dominium utile;* the vassal, and the vassal alone, could dispone his interest and make a settlement of it on any lawful terms. But the disponee did not become vassal to the superior by a disposition by the

(1) Scotch Cases, 4th Series, vol. ii. p. 548.

vassal. He did, however, become so if the disponer, the old vassal, resigned his estate to the superior, in order that a new charter, incorporating the terms of the settlement, might be granted to the disponee as vassal; and the superior accepted that resignation and granted that new charter. I believe the superior was not then compellable to accept such a resignation *in favorem;* he might insist on keeping his old vassal. But I take it that no superior, whether the Crown or a subject, ever could accept a resignation made for the purpose of having such a new charter granted, and then refuse to grant that new charter, and either keep the lands to himself, or grant them away to some one else, or on different terms. That is so obvious a wrong that it is impossible to suppose it could ever be sanctioned by the law. The superior must either refuse to accept the resignation altogether, or accept it as it was given and grant the new charter as prescribed. If he did so he gave no new right, but merely completed that already created by the vassal.

I do not doubt that a vassal might dispone the *dominium utile* of his lands to his superior. The proper way of effectuating this was by a resignation *ad remanentiam;* and when he had done so the superior might do with those freshly acquired lands whatever he might do with any other lands. And if in the present case the fourth Earl of *Perth* had so disponed his lands to the King, I see no reason why the King might not grant them afterwards to the same fourth Earl of *Perth* or Lord *Drummond,* just as he might have granted them to any other person; and if all this had been done, the Appellant's points as to a Royal grant would have been raised.

But the disposition of the 11th of October, 1687, is carefully drawn, in what I believe was the usual way, to hold *vel a me, vel de me,* so as to prevent their being any disposition to the superior. After disponing to *James* Lord *Drummond,* the Earl binds himself to make

> Two several infeftments in due and Competent forme The one thereof to be holden of me and my Airs blench or feu for payment of such blench or feu deuties as may best subsist with the Laues and pratiq of this Kingdome and Releiving me and my forsaids of the few dewties and services if any be payable to my Immediat Laũll superiorȩ of the samine And the other of the saidȩ Infeftmentȩ To be holden fra me and my forsaidȩ of my Immediat laufull

H. L. (Sc.) 1877 — Earl of Perth and Melfort v. Lord Elphinstone.

Superior& Sicklyke and Alse freely in all respects as I presently hold or shall hold the samine my selfe either by resignatione or Confirmatione as shall be thought most meet and expedient And for Effectuating the forsaid Infeftment by resignane he appoints a procurator.

The effect of the first infeftment would be that the disponee would hold the *dominium utile* of the lands on the terms of the settlement, but would hold it as vassal to the Earl of *Perth;* and this required no assent from the superior. The effect of the second infeftment would be, that if the superior assented the disponee would hold on the terms of the settlement direct from the superior. And the resignation, dated the 17th of November, 1687, follows this. It states that,

> Compeared personallie *David Lindsay*, factor to the Earle of *Melfort*, as proctor speciallie constitute by ane noble and potent Lord, *James* Earle of *Perth*, Lord *Drummond* and *Stobhall*, Great Chancellour of his Majesties antient kingdome of *Scotland*, by the proctorie of resignation after mentioned, contained in the disposition under written to the effect after specified, and there the said *David Lindsay*, proctor foresaid, with all humility and condigne reverence as became him, resigned, surrendered, overgave, and delivered All and Haill the lands, lordship, and barony of *Drummond* and Earldome of *Perth*, containing and comprehending all and sundry lands, lordships, baronies, and others underwritten, viz., All and Haill the lands, lordship, and barony of *Drummond*, comprehending the lands and barony of *Drymen alias Drummond*, containing particularly * * * (*Here follows description of lands*)—In the hands of his sacred Majestie King *James* the Seventh, personally present and receaving the same, as immediate lawfull superiour thereof, in favours and for new infeftment of the same baronies, lordship, and others foresds., to be made and granted by our said soveraign Lord, under his Majesties Great Seal of the forsd. kingdome of *Scotland*, to his Majesties right trustie and right well-beloved cousin, *James* Lord *Drummond*,

Following the very terms of the settlement, which are again repeated verbatim in the charter granted on this resignation; and both in the signature and in the charter, the registration *in favorem* contained in the procuratory of resignation is set forth, as it ought to be if it was the warrant for that charter.

I apprehend it is a question of construction, and construing these instruments, I can come to no other conclusion than that the charter of the 17th of November, 1687, was a mere charter by progress, not intended to be, and not being an original royal grant. Such was the opinion of all the Judges below. I do not think my agreement with them on such a point adds weight to their opinion, but I do agree with them.

It is not, however, necessary to decide even this, for by the terms of the charter, as well as all the other deeds of 1687, *James* Lord *Drummond* himself was no ways to be restricted from disponing. And in 1713, *James* Lord *Drummond* did, for reasons easily to be guessed, dispone in favour of *James* Master of *Drummond* and the heirs male of his body, which failing, his other male heirs whatsoever, which all failing, his other heirs and assignees whatever. And this took, as it seems to me, the land quite out of the provisions of the entails of 1687, and amounted to a new destination. It was argued that this was only a propelling of the entail to *James* Master of *Drummond*. There is not a word in the deed of 1713 pointing that way. If I understood the argument of the Lord Advocate rightly, it was that inasmuch as *James* Master of *Drummond* was the eldest son of *James* Lord *Drummond*, the heir male of the body of the Master must be the heir male of the body of Lord *Drummond*, and the heir male of the Master must also be the heir male of Lord *Drummond;* and consequently that though they were otherwise described the heirs in the two destinations were the same. But I think that the mere coincidence of the persons in whom the succession would vest is not enough to lead to the conclusion that the intention was merely to propel the estate, or to justify your Lordships in construing this instrument as other than what it professes to be, a new disposition, and in this there were no prohibitory or resolutive clauses; and consequently it seems to me that on this ground also the judgment below should be affirmed.

LORD GORDON (1):—

My Lords, the Appellant had the assistance in this case of two very able counsel, the Lord Advocate and Mr. *Lowe*, both well qualified to argue the case which involves questions of Scotch conveyancing; and every point was advanced which it was considered necessary to state on their client's behalf; and I am sure your Lordships are satisfied that they did the case every justice.

The interests involved in the present appeal are of great magni-

(1) Revised by his Lordship in print.

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

tude, but I do not think that the decision of the questions raised is attended with difficulty.

The object of the Appellant is, by the present suit, to obtain possession of the estates which, prior to the rebellion of 1745, belonged to the Earls of *Perth*. In that year the proprietor of the estates was *James*, called third Duke of *Perth*. He and his brother, Lord *John Drummond*, took part in the rebellion of that year, and in consequence they were attainted by Act of Parliament. *James* died before the expiration of the period allowed him for surrender; and Lord *John Drummond*, who was his nearest heir male, succeeded to the estates. Lord *John* did not surrender, and the consequence was that the estates which descended to him on his brother's death became forfeited to the Crown. There were several legal questions raised in connection with the estates, to which it is unnecessary now to refer. By the Act 20 Geo. 2, passed in 1747, the estates became vested in the Crown, and by the Act 25 Geo. 2, they were inalienably annexed to the Crown, and they remained in the possession of the Crown till they were, in virtue of the *Restoration Act*, passed in the year 1784 (24 Geo. 3, c. 57), made over to *James Drummond* (afterwards created a British Peer, under the title of Lord *Perth*, Baron *Drummond* of *Stobhall*), as heir male of Lord *John Drummond* (who had forfeited the estates as before mentioned) and his heirs and assignees. This *James* Lord *Perth* died in the year 1800, and was succeeded in the estates by his daughter *Clementina*, afterwards Lady *Willoughby D'Eresby*, who died in 1865, and she was succeeded in the estates by the present Respondents, her trustees in virtue of a trust disposition executed by her.

The Appellant, the Earl of *Perth* and *Melfort*, claims to be nearest and lawful heir male in general to *James Drummond*, third Duke of *Perth*, who died in 1746, and has been served in that capacity. In that character he, in the year 1868, raised an action of reduction and declarator against the Respondents to obtain possession of the estates in question on the ground that at the time of the forfeiture in 1746 the estates were entailed, and that the effect of the forfeiture was to give to the Crown only the life interest which belonged to Lord *John Drummond, as an heir of entail*, and that on his death the estate reverted to the heirs of entail nominated by the deed under which the estate was tailzied,

and that the Appellant was the nearest of these heirs of entail, and entitled to the estates.

The Appellant's main contention in that case was that the estate was entailed in virtue of a procuratory of resignation, containing prohibitory, irritant, and resolutive clauses, dated the 11th of October, 1687, executed by *James*, first Duke of *Perth*, and that, following upon this procuratory of resignation, a regular feudal title was completed by a Crown charter of resignation and *novodamus* in his favour, upon which infeftment duly followed.

It was averred by the Respondents in that case, that the deed relied on by the Appellant was not entitled to the effect of a deed of strict entail, in respect it had not been recorded in the register of entails, as required by the Act 1685; and that plea was given effect to by the Court of Session, and afterwards by this House on appeal, in 1871 (1).

The judgment so pronounced in that action is decisive of the Appellant's rights so far as founded on the entail said to be constituted by the procuratory of resignation of 1687, and on the other *media concludendi* set forth by him in that action.

But the Appellant has raised another action, now before your Lordships, with substantially the same conclusions, and in which he seeks reduction of the same deeds. The Respondents met this action with a plea of *res judicata;* and the Lord Ordinary, before whom the action depended, gave effect to that plea; and found that the Appellant had not libelled or condescended on any right or title to the said lands or estate entitling him consistently with the judgment in the former action to insist on the conclusions of the present action, and therefore dismissed it.

But their Lordships of the Second Division of the Court of Session, on the case coming before them, considered that there were several new grounds of action set forth by the Appellant which were not covered by the former action, and therefore they in substance repelled the plea of *res judicata.* But on considering the new grounds of action, their Lordships were of opinion that they were irrelevant, or not well founded on their merits, and therefore they dismissed the action (2).

(1) 2 Scotch App. Cases, 139; Scotch Cases, 3rd Series, vol. vii. p. 651.

(2) Scotch Cases, 4th Series, vol. ii. p. 538.

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

This is the judgment which is appealed from, and on which your Lordships are now called to decide.

Your Lordships are not called on to consider the plea of *res judicata;* and therefore I do not further advert to it. If that point had now required to be decided I might have felt some hesitation in taking part in its consideration, as I happened to be one of the counsel for the Appellant in the former case—in the case decided by your Lordships in 1871. But that question does not now arise. I assume that the Appellant is entitled to insist in the present action on the grounds now founded on by him, and which were not included in the former action. But the question for your Lordships' decision is, Whether these new grounds of action are well founded.

The Appellant does not now found upon the procuratory of resignation of October, 1687, as constituting the entail under which he says the estates were held. He now says:

> Further research and a fuller knowledge of the writs upon which the Appellant's claims to the *Drummond* estates are based, have shewn that the procuratory of resignation of 1687 was not the title under which the estates were held when Lord *John Drummond* was attainted, but that they were held under an entail to which the objection that it was not recorded in terms of the Act 1685, does not apply, and that they were held under an investiture sufficient to prevent the treason of an heir taking under it from involving forfeiture of the estate to the Crown.

The deed to which the Appellant thus refers is the Crown charter which followed upon the procuratory of resignation of October, 1687, and to which I shall afterwards advert.

But besides that charter the Appellant also founds on two previous charters, one in 1588 and the other in 1679. But neither of these charters was in the proper sense of the term a deed of entail, as they did not contain prohibitive, irritant, or resolutive clauses.

The *first* charter, that of 1588, was granted by King *James* VI. in favour of Lord *Patrick Drummond,* for the purpose of erecting the estates into a feudal lordship and barony. The charter is not referred to in the opinions of the Judges in the Court of Sessions, and was barely referred to in the Appellant's argument at your Lordships' Bar. I think all that need be said about it is, that it contained a destination of heirs under which the estate

was held till the year 1679. As it was not a deed of entail, I fail to see how it can in any way help the Appellant's case.

The *second* charter founded on by the Appellant, that of 1679, followed on a procuratory of resignation by *James*, fourth Earl and first Duke of *Perth*, and who was the Chancellor of *Scotland*, and was for the purpose of uniting the honours and estates into a "haill and free earldom." The charter was granted in favour of the Chancellor in liferent, whom failing, to *James* Lord *Drummond*, his eldest son, and the heirs male of his body to be lawfully begotten, in fee, whom failing, to return to the Chancellor and his heirs and assignees whomsoever. But this destination was not fenced with the usual entail clauses; on the contrary, power was given to the Chancellor, without the consent of his son, to sell, alienate, and dispone the estates, or part thereof, as he saw proper. And it will be presently seen that the Chancellor took advantage of this power, and created a new investure of the estates by the series of deeds of 1687. This charter, like that of 1588, was not a deed of entail, and therefore I think it is of as little value to the Appellant's case. The charter, no doubt, was ratified by Parliament. But the ratification did not go beyond the words of the charter, and is of no value in the present controversy.

The *third* charter is that mainly relied upon by the Appellant. It followed upon the procuratory of resignation by the Chancellor of the 11th of October, 1687, and is an echo of that procuratory, containing all the clauses which the Appellant relied on in the former action as constituting a deed of strict entail of the *Drummond* estates. The Appellant admits that the charter has not been recorded; but he says that that was unnecessary, as the deed was not a deed by a subject (to which he contends the *Entail Act* of 1685 only applies), but was a deed by the Sovereign, which did not require recording to give it validity. This argument by the Appellant makes it necessary to consider very carefully the effect to be given to this charter.

The whole of the Judges in the Second Division of the Court of Session have given elaborate opinions on the point raised; and they have unanimously held that the charter is not entitled to the

H. L. (Sc.) 1877 EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

effect of a deed of entail. This is a matter of Scotch conveyancing, and in such a question your Lordships will not be disposed, without very strong reasons, to alter the judgment so arrived at by that Court.

I have given the Appellant's contentions very careful consideration, but I have not seen any cause to doubt that the decision of the Court of Session is right.

I cannot look on the charter in question as in any sense an original charter. The estate had been long previously given out to a subject, and all that remained in the Crown was the *dominium directum*, or right of superiority. The *dominium utile* of the estate was the property of the subject or vassal, which he was entitled to deal with as he thought proper. The vassal resolved to execute an entail. He accordingly executed a procuratory of resignation, containing the terms of the investiture he desired to have entailed, with the proper prohibitive and irritant and resolutive clauses. This was the ordinary form in which Scotch entails were in use to be executed. But in order to have effect given to the new investiture, it was necessary to have it feudalised, and this could only be done by resigning the estate into the hands of the Crown, as superior, for new infeftment, and obtaining from the Crown a charter of resignation in terms of the procuratory, with a precept of sasine for infefting the vassal in terms of the new investiture. But the charter did not form the entail. I think the Appellant was right in the former case in holding that the procuratory of resignation was the deed constituting the entail. The charter was merely part of the machinery for giving effect to the entail. It was not in any right sense an original charter, but was a mere charter by progress. Lord *Gifford* says, and I entirely concur with him:

> It humbly appears to me that there is no foundation whatever for this contention. The charter of resignation and *novodamus* is a mere charter by progress. Its sole warrant is the procuratory of resignation, which prescribes its terms. The Crown, like any other superior, will insert in a charter by progress any condition which the owner pleases not affecting the superior's rights. An entail is never the act of the superior, but the act of the vassal or proprietor, who alone has right, if he chooses, to entail the lands in accordance with law. The clause of *novodamus* does not in the least alter the nature of the deed, but is merely inserted to meet the case of lost title-deeds, or of doubts as to the validity of the

title, and to form the foundation for a new and prescriptive right. I have never heard it suggested till now that a superior, whether a subject superior or the Crown, can create an entail by conditions in a charter, independently of the Act of 1685. On this point I entirely agree with the Lord Ordinary that no Crown charter proceeding upon a procuratory of resignation, and whether containing a clause of *novodamus* or not, can ever create an entail, or affect in any way the Crown's rights, or alter the general law of treason.

It being clear then, as I think, that the charter cannot have higher effect given to it than would be given to a deed by a subject, it follows that to give the effect of a deed of strict entail to the charter (supposing it to be competent to constitute an entail by a charter for which no authority was cited), it required to be recorded in the register of entails, and as that was not done, it cannot receive effect as a deed of entail.

The Appellant founded strongly on a clause in the charter providing that if any heir succeeding to the estates should commit the crime of treason, or any other crime involving forfeiture, the right of the contravenor and his issue should *ipso facto* cease and determine, and be vacated as if it had never been granted, and the lands, and other grants, should go to the next person in succession and his heirs male. If such a clause had occurred in an original charter from the Crown, it would have been deserving of serious consideration, and it might have raised various constitutional questions of great importance. But in the view which I take of the case, we have no such original charter before the House. As I have said, I think the charter is a mere charter by progress, and the provision must, I think, be looked on as a clause in a deed by a subject, which cannot overrule the common law, and therefore I think it is not entitled to any effect. This was the view which was taken by the Judges in the Court below, and I quite concur in it.

I do not consider it necessary to advert particularly to the various deeds and charters relating to the estates which were executed in 1713 and 1731. I think these deeds establish that the estates were considered and dealt with by the parties concerned as being unfettered by any entail, and as being held in fee simple. But as it is, in my view, conclusively established that there was no valid entail affecting the property, I think the whole

H. L. (Sc.) 1877

EARL OF PERTH AND MELFORT v. LORD ELPHINSTONE.

of the Appellant's case fails, and it is unnecessary to consider anything further.

On the whole matter, therefore, I concur in the judgment of the Court of Session, and think that it should be affirmed, and the appeal dismissed with costs.

Adjudged that the interlocutors complained of be affirmed, and the appeal dismissed with costs.

Agents for the Appellant: *Willoughby & Cox.*
Agent for the Respondents: *W. A. Loch.*

[PRIVY COUNCIL.]

RICHARD GRICE AND OTHERS . . . . DEFENDANTS; J. C.*
1877
AND Dec. 6.
RICHARDSON AND OTHERS (TRUSTEES OF JOSEPH WEBSTER & CO., INSOLVENTS . .) PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Sale of Goods—Insolvency of Purchasers—Lien of Vendors who are also Warehousemen for their Purchasers.

Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency.

Where the vendors were also warehousemen of the goods sold, under an arrangement with the purchasers to pay warehouse rent :—

Held, that, as the goods remained in the possession of the vendors and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees.

APPEAL from an order of the Supreme Court of *Victoria* (Dec. 7, 1876) making absolute a rule *nisi* to set aside a nonsuit and enter a verdict for the Respondents for £1252 4*s.* 2*d.* with costs, in an action of trover brought by them against the Appellants in respect of certain chests and boxes of tea sold by the Appellants to Messrs. *Joseph Webster* and *James Price Goulstone*, of whose estate the Respondents are trustees.

The declaration contained two counts in trover, one alleging the conversion before, and the other after, the insolvency of Messrs. *Joseph Webster & Co.* The Appellants pleaded the general issue to the whole declaration, and also traversed the allegations of property in Messrs. *Webster & Co.* and the Respondents respectively. Upon these pleas issue was joined, and the cause was tried on the 6th of November, 1876, before the Chief Justice and a jury, when the facts as stated in the judgment of their Lordships printed below were proved or admitted.

The Chief Justice directed a nonsuit should be entered, with

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1877

GRICE v. RICHARDSON.

leave to the Respondents to move to enter the verdict for them for £1252 4*s.* 2*d.*; who, as above stated, subsequently obtained a rule absolute to that effect.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Appellants, contended that they, as unpaid vendors, were entitled upon the insolvency of the buyers to retain their possession of the tea until their lien for the price had been discharged. Neither the Respondents nor *Webster & Co.* had obtained possession of the tea, and nothing had taken place to deprive the Appellants of their lien as unpaid vendors, or to entitle the Respondents to maintain their action. Suppose the Appellants had put the goods in a carriage to be delivered to the purchaser, they would have had a right to stop them *in transitu* on hearing of the insolvency, and *à fortiori* they had a right to stop them before the *transitus* had even commenced. The vendors' rights could not be defeated, as the Chief Justice seemed to think, by any constructive delivery of the goods; to destroy the lien an actual delivery was necessary. As to the rights of a vendor over goods in hand when his purchaser becomes insolvent see *Blackburn* on Sales [Ed. 1845], p. 320; *Bloxam* v. *Sanders* and *Bloxam* v. *Morley* (1). [SIR MONTAGUE E. SMITH:—Stoppage *in transitu* involves the notion that delivery is not complete; here the question is whether under the special circumstances of the case the delivery had not been completed before the insolvency. Mr. *Butt*, Q.C.:—We say that the vendors by transfer entry in their own books and by receipt of rent are shewn to be the insolvents' warehousemen.] The Appellants did not rent to the insolvents that part of the warehouse in which the goods in question were located. No question of constructive delivery arises. Reference was then made to *Turner* v. *Liverpool Docks Company* (2); *Townley* v. *Crump* (3); *Donald* v. *Suckling* (4); *Ex parte Chalmers, In re Edwards* (5); *Griffiths* v. *Perry* (6); *Miles* v. *Gorton* (7). Assuming that the vendors here became bailees for the purchasers, the insolvency of the latter

(1) 4 B. & C. 949.
(2) 6 Exch. 543; 20 L. J. (Ex.) 394.
(3) 4 A. & E. 58.
(4) Law Rep. 1 Q. B. 585; 35 L. J. (Q.B.) 237.
(5) Law Rep. 8 Ch. 289.
(6) 1 E. & E. 680; 28 L. J. (Q.B.) 204.
(7) 2 Cr. & M. 504.

revived the vendors' lien, and if in any way they possessed a control over the goods they could stop them. See *Dodsley* v. *Varley* (1); *Valpy* v. *Oakeley* (2); *M'Ewan* v. *Smith* (3). As to damages, see *Halliday* v. *Holgate* (4).

Mr. *Butt*, Q.C. (Mr. *R. E. Webster* with him), for the Respondents, contended that the Appellants held the goods as warehousemen for the insolvents, and not as unpaid vendors, and had subsequently attorned to the Respondents, whose bailees they were. The question is, what is the effect of what was done in the Appellants' warehouse after the sale. As to there being no such thing as a constructive delivery, and no limit to the vendors' right to stop *in transitu*, in ordinary cases if goods are delivered to a carrier, and a bill of lading is given by the carrier to the vendor, who indorses to a third party, that is in law a delivery to him. [SIR MONTAGUE E. SMITH:—The question is, whether there can be a constructive delivery between vendor and vendee.] In all those cases the property has passed, and is in the vendee, and the test of the vendor's right is, whether the warehouseman held as agent for the consignor or as agent for the consignee. Here, on the evidence and admitted facts, the Appellants became agents for the vendees. He referred to the notes to *Lickbarrow* v. *Mason* (5). The vendee does not get actual possession in those cases where stoppage *in transitu* is permitted; the carrier has a certain right, and his intermediate possession protects the vendor; but when goods are in a warehouse the case is different. It was intended here that the goods should belong to the vendees whilst in the warehouse, and also that those vendees should be charged with rent. He referred to the cases cited on the other side.

Mr. *Benjamin*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment of the Supreme Court of the colony of *Victoria*, making absolute a rule *nisi* obtained on the

(1) 12 A. & E. 632.
(2) 16 Q. B. 941; 20 L. J. (Q.B.) 380.
(3) 2 H. L. C. 309.
(4) Law Rep. 3 Ex. 299.
(5) 1 Smith's L. C. 699.

J. C. 1877 GRICE v. RICHARDSON.

25th of November, 1876, to set aside a nonsuit, and enter a verdict for the Respondents for £1252 4*s.* 2*d.* with costs, in an action brought by the Respondents as trustees of the property of *Joseph Webster* and *James Grice Goulstone*, trading as *Joseph Webster & Co.*, insolvents, to recover from the Appellants damages for the alleged conversion of 551 half chests and 297 boxes of tea.

The tea in question was the residue of three parcels which had been purchased at different dates between the 13th of February and the 1st of June, 1876, from the Appellants by the Respondents, who gave their acceptances or promissory notes for the price. The Appellants, who had imported the tea, were also warehousemen, having a bonded warehouse, in which, upon its importation, they had warehoused it. On the occasion of each sale they handed to the Respondents certificates or warrants, each of which stated that the tea covered by it was warehoused by the Appellants on the 1st of January, 1876, and was deliverable to order by indorsement thereon. The certificates were in the first instance indorsed generally by the Appellants. Subsequently the clerk of Messrs. *Joseph Webster & Co.* got the words "of *J. Webster & Co.*" written upon each of the delivery orders or certificates. The additional words were signed by *J. D. L. Morton*, the clerk of *Grice, Sumner, & Co.;* and by virtue of those words it appears that the delivery orders, instead of making the teas deliverable generally to order by indorsement, made them deliverable to the order of *J. Webster & Co.* On three subsequent dates between the 13th and 30th of June, 1876, entries were made in the transfer of certificates at the bonded warehouse, importing that the teas had been transferred to *J. Webster & Co.* On the 3rd of July, 1876, *Joseph Webster & Co.* became insolvent, and their acceptances and notes were subsequently dishonoured, and have never been paid. Before their insolvency all the teas purchased by them, except those for which the action was brought, had been actually delivered to them or to their order, and the question is, whether the transactions above described were such as to deprive the vendors of their right of lien.

In the cases of *Bloxam* v. *Sanders*, and *Bloxam* v. *Morley*, which are reported in 4 *Barnwell* and *Cresswell's* Reports, p. 949,

Mr. Justice *Bayley* lays down the rule very clearly. He says, "The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or a tender of the price is a condition precedent on the buyer's part, but until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him. But his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in cases of insolvency the point seems to be perfectly clear."

It seems, therefore, to be clearly settled, that unless actual possession has been delivered to the purchaser the vendor is not deprived of his right of lien as against the assignees of the purchaser in the event of his insolvency.

But the question in this case arises from the circumstance that the Appellants filled the double character of vendors and warehousemen. By the delivery order it was stated that rent was to commence from the 12th of January, 1876; and it appears that at the time when *Webster & Co.* obtained a transfer of the goods to themselves, their clerk had the rent calculated up to the month of July. The question then comes, was the arrangement that warehouse rent was to be paid equivalent to an actual delivery, so as to prevent the vendors from having their right of lien. That point seems to have been determined in the case of *Miles* v. *Gorton and Others*, which has been cited from the 2nd *Crompton* and *Meeson's* Reports, p. 504. The following is the marginal note in that case: "Goods were sold under an invoice which expressed that they remained at rent. The vendee subsequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he

J. C. 1877 GRICE v. RICHARDSON.

paid. Subsequently the vendee became bankrupt, and the bill was dishonoured. Held that the assignee of the bankrupt vendee could not without paying the price maintain trover against the vendor for the residue of the goods which had remained in his hands." In the argument in that case it was contended that the vendor held in two capacities,—one as warehouseman and the other as vendor. Sir *William Follett*, in arguing the case, said, "It can surely make no difference whether the receipt of rent, and the other acts shewing a delivery, are done by a third person, or whether the vendor unites in himself the character of vendor and warehouseman; the acts done by him as a warehouseman must have the same effect on his rights as vendor as if those acts were done by a third person being a warehouseman, and not the vendor." In answer to that remark Mr. Justice *Bayley* says, "The goods remained in the possession and control of the vendor. Where the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee, instead of the vendor, and it may then well be said that the warehouse is the warehouse of the vendee, as between him and the vendor. I do not think that the payment of warehouse rent has the effect of a constructive delivery of the whole in a case where the goods remained in the possession of the vendor."

In this case the goods, whilst in the warehouse, though rent was payable for them, remained in the possession of the Appellants: and their Lordships are of opinion that as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees.

Under these circumstances their Lordships think that the Plaintiffs are not entitled to recover; and they will humbly advise Her Majesty that the judgment of the Supreme Court and the rule absolute be reversed and set aside, and that the rule to set aside the nonsuit and to enter a verdict for the Plaintiffs, Respondents, be discharged with costs. The costs of this appeal will be paid by the Respondents.

Solicitors for the Appellants: *Vallance & Vallance.*
Solicitors for the Respondents: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

HENRY PRINCE AND OTHERS . . . . . PLAINTIFFS;

AND

ORIENTAL BANK CORPORATION . . . DEFENDANTS.

J. C.*
1878
Jan. 23, 24.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Branch Banks—Effect of uncommunicated Transfers and Entries of Payment—Notice of Dishonour of Promissory Note.

The mere fact of cancelling the signature of the makers of a dishonoured promissory note and writing "paid" on the note, corrected before the note is sent back to the Plaintiffs by a memorandum thereon "cancelled in error," cannot be effectual to charge a bank with the receipt of the money.

Warwick v. *Rogers* (1) approved.

Where a promissory note is returned dishonoured to the Plaintiffs, the amount thereof having been transmitted by transfer drafts and entries in the bank's books, from the branch where the same was made payable to the branch where the Plaintiffs paid the same in, such transfer and entries not being communicated to the Plaintiffs, *held*, that the bank could not be charged with the receipt of the money.

The position of branch banks is, that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, *e.g.*, that of estimating the time at which notice of dishonour should be given; or of entitling a banker to refuse payment of a customer's cheque except at that branch where he keeps his account.

APPEAL from a judgment of the Supreme Court of *New South Wales* (Sept. 11, 1876), (*Hargrave* and *Faucett*, JJ., *Martin*, C.J., dissenting), making absolute a rule *nisi* to set aside a verdict for the Appellants and to enter a verdict for the Respondents in an action for money alleged to have been received by the Respondents for the use of the Appellants.

The declaration also contained the common counts for interest,

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 5 M. & G. 340.

J. C. 1878 PRINCE v. ORIENTAL BANK CORPORATION.

and upon accounts stated between the parties. The Defendants pleaded the general issue, upon which plea issue was joined, and the trial took place before *Martin*, C.J., and a jury on the 18th of August, 1875.

The facts are stated in the judgment of their Lordships.

Mr. *Cohen*, Q.C., and Mr. *Erskine Pollock*, for the Appellants, contended that the promissory note being payable on the 3rd of April, the Respondent bank treated it as paid during the whole of that day, and were not afterwards entitled to treat it as unpaid, and to refuse to remit the amount thereof. From the mode in which they dealt with the note they made it their own, and rendered themselves liable to pay the amount thereof to the Appellants. The *Sydney* branch of the Respondents' bank were the agents of the Appellants to collect the note, and the communication to that branch by the *Murrumburrah* branch that the note was paid, was a communication to the Appellants of the Respondent's assent to hold a sum equivalent to the amount of the note for the use of the Appellants: *Pollard* v. *The Bank of England* (1) was referred to.

The cases relied upon on the other side all follow *Williams* v. *Everett* (2), and are distinguishable from this case, for here the *Sydney* branch, as the Plaintiffs' agents, received the money to the Plaintiffs' use, and the Respondents thereby were rendered liable in this action.

The Respondents, moreover, having cancelled and stamped the note as paid, under the circumstances of the case are estopped from denying that they have received the amount thereof for the use of the Appellants. The estoppel is founded not so much on any representation made to the Plaintiffs as upon the fact that the *Sydney* branch of the Respondent bank were employed as the Appellants' agents. Reference was made to *Mackersy* v. *Ramsays* (3), decided in 1843. See also *De Bernales* v. *Fuller*, reported in a note to *Williams* v. *Everett* (4).

For many purposes branch banks are deemed in law to be distinct banks, and the Appellants were entitled to treat the *Sydney*

(1) Law Rep. 6 Q. B. 653.
(2) 14 East, 582 (1811).
(3) 9 Cl. & F. 818.
(4) 14 East, 590.

branch as a distinct bank for the purpose of receiving payment of this promissory note on behalf of the Appellants from the branch at which the makers of the note kept their account. For that purpose, as well as for others, the two branches were as distinct as in this country are a country bank and its *London* agents. See *Byles* on Bills [last ed.], p. 26, and the cases there referred to; *Clode* v. *Bayley* (1); *Woodland* v. *Fear* (2); *Warwick* v. *Rogers* (3); *Byles* on Bills [last ed.], p. 28.

Mr. *R. E. Webster* (Mr. *Benjamin*, Q.C., with him), for the Respondent Bank, urged that admittedly no money was ever in fact received from Messrs. *Hopkins & Gate*, and that nothing occurred which amounted or was equivalent to payment by the makers of the note. The Respondents are not estopped from shewing that the bill was dishonoured. The erroneous cancellation of the signature of the note, and the entries in the Respondents' books at *Murrumburrah*, are no estoppel as against the Respondents, the entries having been corrected before any notification of payment had been given to the Appellants or to the makers of the note. The case was practically determined by *Mackersy* v. *Ramsays* (4). He referred to *Williams* v. *Everett* (5); *De Bernales* v. *Fuller* (6); *Warwick* v. *Rogers* (3); *Garnett* v. *McKewan* (7); *Clode* v. *Bayley* (1); *Woodland* v. *Fear* (2). With regard to the right of bankers to alter entries in their own books, see *Simpson* v. *Ingham* (8), where it was held that such entries did not amount to a complete appropriation until it was communicated to the party to be affected by it. Lastly, if the money had been received it would have been the money of the *New South Wales Bank*. There was no privity between the Appellants and the Respondent Bank, and therefore the money if received would not have been money had and received to the Appellants' use. See *Mackersy* v. *Ramsays* (4).

Mr. *Cohen*, Q.C., replied.

(1) 12 M. & W. 51.
(2) 7 E. & B. 519; 26 L. J. (Q.B.) 202.
(3) 5 M. & G. 340.
(4) 9 Cl. & F. 818.
(5) 14 East, 582.
(6) 14 East, 590.
(7) Law Rep. 8 Ex. 10.
(8) 2 B. & C. 65.

J. C.
1878
PRINCE
v.
ORIENTAL
BANK
CORPORATION.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

In this case their Lordships are of opinion that the judgment of the Court below ought to be affirmed.

The action is brought to recover money alleged to have been received by the Defendants for the use of the Plaintiffs. It is essential to the maintenance of such an action that the money sought to be recovered should have been actually received by the Defendants, or that something should have occurred which is equivalent to a receipt of money, or that representations should have been made to the Plaintiffs under circumstances which would estop the Defendants from denying the receipt of the money. In the present case their Lordships think that neither of those positions is established by the evidence.

The facts lie in a small compass. The Defendants' bank, which appears to be an English corporation, has branches at *Sydney*, *Murrumburrah*, and *Young*, in *New South Wales*, the branch at *Sydney* being apparently the head branch. The Appellants, Messrs. *Prince & Co.* held a promissory note made by Messrs. *Hopkins & Gate*, who are described as storekeepers at *Young*, for the sum of £426 9*s*. The note is dated on the 1st of December, 1874, and fell due on Saturday, the 3rd of April, 1875. *Hopkins & Gate* had an account with the Respondents' branch bank at *Young*, but had no account at the *Murrumburrah* or *Sydney* branches. The note was made payable, not at *Young*, but at the *Murrumburrah* branch, and this was done at the request of the Respondents' manager of the *Young* branch in order that the Respondents might get some commission upon the collection of the note. This was the state of facts at the time that the note was coming due. Upon the time for payment of the note approaching, the Appellants lodged it with the *Bank of New South Wales*, who were their own bankers, for the purpose of collection. That bank thereupon became the agent of the Plaintiffs to collect the amount. The *Bank of New South Wales* then handed over the note to the Defendants' bank at *Sydney* to collect for them, that is, for the purpose of sending it on to *Murrumburrah*, where it was made payable.

What occurred at the *Murrumburrah* branch is stated in the Respondents' case, and it may be assumed to be correctly stated, inasmuch as the statement was adopted by the learned counsel for the Appellants. It is this: "The note was transmitted in due course by the Respondents to their *Murrumburrah* branch, at which it was made payable, and it was there stamped as having been paid on the 3rd of April, the day on which it fell due, and on the same day the Respondents' manager at *Murrumburrah* sent to their manager in *Sydney* a transfer draft in favour of the *Bank of New South Wales* for £758 3*s.* 8*d.*, being for four separate items, one of which was *Hopkins & Gate's* note for £426 9*s.*" Documents were put in at the trial to shew what occurred at the *Murrumburrah* branch. Exhibit B., headed "Application for a draft," is a memorandum which contains this entry, "Wanted a draft on *Sydney* at D. in favour of *Bank of New South Wales* for the sum of £758 3*s.* 8*d.*" That sum is made up of this note of *Hopkins & Gate* for £426 9*s.*, and of three other notes or bills, making the amount of £758 3*s.* 8*d.* This memorandum appears to have been made in the ordinary course of business by a clerk for the purpose of having the draft made out by another clerk. It appears, though the instrument itself does not appear in the record, that a draft, or what is called a draft, was made out and sent to the *Sydney* branch in a letter (Exhibit G.), dated the 3rd of April, which contains this passage, "I enclose the following transfer drafts with particulars thereon 25/168. Manager at *Melbourne*, £101 18*s.* 5*d.*—176. *Bank of New South Wales*, £758 3*s.* 8*d.*"

The statement in the Respondents' case then goes on: "In the Respondents' books at *Murrumburrah* there was an account current between the *Young* agency and the *Murrumburrah* agency, and in that account, under date the 3rd of April, the *Young* agency, where *Hopkins & Gate* banked, is debited with their note for £426 9*s.* and other items, and under the same date credit is given for the above-mentioned draft for £758 3*s.* 8*d.* At about 2 P.M. on Sunday, the 4th of April, *Hopkins & Gate's* store at *Young* was entirely destroyed by fire. On Monday, the 5th of April, the *Murrumburrah* manager wrote to the Respondents' *Sydney* manager, requesting him to cancel the transfer draft in favour of the *Bank of New South Wales*, and returning the promissory note

J. C. 1878 PRINCE v. ORIENTAL BANK CORPORATION.

dishonoured, and on the receipt of the latter the Respondents' *Sydney* manager returned the note to the *Bank of New South Wales*, and on the 7th of April that bank gave the Plaintiffs notice of the dishonour of the note."

The notice of dishonour is set out. It is an ordinary notice of dishonour, making no reference to what had occurred between the branches of the bank or to the memoranda made upon the bill. It nowhere appears that notice was given by the Respondents to Messrs. *Hopkins & Gate* that their account was charged, and there was no evidence that it ever was in fact charged with the amount of the note, and no intimation was given by the Respondents to the Appellants or to the *Bank of New South Wales* that it had been paid.

The note itself was put in at the trial. It is an ordinary promissory note made payable at the *Oriental Bank, Murrumburrah*, and upon its production it appeared that the names of the makers, *Hopkins & Gate*, had been struck through, or, to use the ordinary term, cancelled. There was also on it a memorandum, "Paid 3/4/75." But a memorandum in pencil also appeared upon the note, "cancelled in error by *J. O. Atchison*."

These being the facts, it is clear beyond dispute that the makers of this note, Messrs. *Hopkins & Gate*, had not paid any money in respect of it into the bank. There is no evidence of the state of their account at *Young*, and it certainly cannot be taken as against the Defendants that that account was in funds. The Plaintiffs, although they called Mr. *Hopkins*, did not attempt to prove that the *Young* branch was in funds, or that *Hopkins & Gate* had any agreement with the Defendants' bank for the payment of this note.

It is contended on behalf of the Plaintiffs that what passed between the *Murrumburrah* and the *Sydney* branches of the bank, and the remittance by the officer at *Murrumburrah* to the officer at *Sydney* of the transfer note, was equivalent to a payment of money to the *Sydney* branch. But even so, the whole case of the Appellants must rest upon the foundation that these branches are to be treated for this purpose as if they were separate and independent banks. If they had been separate and distinct banks, it may be that the remittance by the *Murrumburrah Bank* to the

bank at *Sydney* of this draft to be put to the credit of the *New South Wales Bank*, would, if so accepted, have been equivalent to a receipt on the part of the *Sydney Bank* of money from the *Murrumburrah Bank* to be held for the *New South Wales Bank*. But the difficulty of the Plaintiffs' case is that these banks are not separate and distinct banks, but branches of one and the same banking corporation or establishment. They are, indeed, separate agencies, but agencies of one principal, that principal being the corporation of the *Oriental Bank*. How, then, are the Defendants liable? They have not received the money, nor anything equivalent to money, from any source outside their own establishment. Supposing the *Murrumburrah* branch had sent money from their till to the branch at *Sydney*, whose money would it have been? Surely, the money of the *Oriental Bank*. It would have gone from the till at *Murrumburrah* to the till at *Sydney*, but would remain, notwithstanding the transfer, the bank's own money. Then, if so, the remittance of the draft and the entries, which at most are only equivalent to a transfer of money, and might be so as between distinct banks, cannot have greater effect than an actual transfer of money. They are entries and transactions only by and between the respective officers of the same bank.

If these transactions had been communicated to the *New South Wales Bank* or to the Plaintiffs, it may be that the *Oriental Bank* would have been estopped from saying that they did not hold the money to the account of the Plaintiffs or of the *New South Wales Bank*. But no such communication was made; and before anything was known beyond the walls of the bank itself, the order given by the officer at *Murrumburrah* to the *Sydney Bank* to credit the *New South Wales Bank* was cancelled and withdrawn, and the memorandum "cancelled in error" was made upon the note. The first thing that the Plaintiffs or the *New South Wales Bank* hear or know, is that the note is dishonoured. If any damage has arisen in consequence of negligence or delay on the part of the bank in getting payment of this note, an action may lie for such omission or negligence, in which the true amount of damages would be assessed, but their Lordships have nothing to do with any question of that kind. The single question they have now

J. C. 1878 PRINCE v. ORIENTAL BANK CORPORATION.

to determine is whether money has been received by the Defendants to the use of the Plaintiffs, or whether they have in any way held out to the Plaintiffs that there was money in their hands belonging to the Plaintiffs.

The mere fact of cancelling the signature of the makers, and writing "paid" on the note, corrected, as it was, before the note was sent back, by the memorandum "cancelled in error," cannot be effectual to charge the bank with the receipt of the money: see *Warwick* v. *Rogers* (1); nor, unless the branches are to be regarded as distinct banks, can the uncommunicated entries in the books of the bank have such an effect: see *Simson* v. *Ingham* (2).

The case really turns upon the position or *status* of these branch banks.

In principle and in fact they are agencies of one principal banking corporation or firm, and the few decisions which have taken place with respect to them are consistent with this view. In the case of *Clode* v. *Bayley* (3) it was held that for the purpose of estimating the time at which notice of dishonour should be given, the different branches were for that purpose to be regarded as distinct. In considering whether notice of dishonour was given in time it was thought reasonable that the bill should be sent successively to the branch banks through which it had come to the principal bank, before giving the notice. It was pointed out by Lord *Abinger* that it was not possible for the bank in *London* to know from whom the bill came; therefore it was necessary, in the ordinary course of the transaction of business, that it should be sent to the branches before notice of dishonour could properly be given.

In the case of *Woodland* v. *Fear* (4) it was held that a joint stock bank was bound to pay the cheques of a customer at that branch only at which he kept his account, and had not violated its engagement with the customer by refusing to pay his cheque at another branch. The reason of this decision is obvious. It would be difficult for a bank to carry on its business by means of various branches if a customer who kept his account at one branch might

(1) 5 M. & G. 340.
(2) 2 B. & C. 65.
(3) 12 M. & W. 51.
(4) 7 E. & B. 519.

draw cheques upon another branch, however distant from that at which he kept his account, and demand that they should be cashed there. The latter branch could not possibly know the state of his account. The case decides no more than this, that the bank came under no engagement or promise to their customer to honour his cheques at any branch except that at which he kept his account.

The only other case is one that affords strong support to the view which their Lordships are disposed to take: *Garnett* v. *McKewan* (1). There the Plaintiff had accounts at two branches of the *London and County Bank*. His account at branch *A*. was in funds; his account at branch *B*. was over-drawn. He drew a cheque upon his account at branch *A*. where he had funds, and the bank refused to pay it because his account at branch *B*. was over-drawn, and the Court held it was justified in so doing. The principle of that decision affirms the identity of the bank and its several branches; though separate agencies, the latter were still agencies of one principal bank, with which alone the Plaintiffs contracted. Acting upon this principle, the Court held that the money of the Plaintiff lodged at one branch, and being still there to the credit of his account, was to be treated as part of the customer's entire account with the bank, and that the whole account was to be looked at to see on which side as between him and the bank the balance stood. Mr. Baron *Bramwell* said: "The question is one of mixed law and fact. It is admitted that in some cases the bank could not debit the customer with a debt due to them; for example, a debt due to the bank as carrying on a different business as that of brewers. Nor again, would they have any right to blend two accounts kept by one person with them in different characters as a personal and a trust account."—No, nor would any bank, whether it had branches or not. "But here there was nothing except the fact that there were two branch establishments." That fact, in the opinion of the learned Judge, established no difference between the case of a bank having branches and an ordinary bank.

Another question of some importance has been argued,—

(1) Law Rep. 8 Ex. 10.

J. C. 1878 PRINCE v. ORIENTAL BANK CORPORATION.

whether, assuming that the bank had received the money from the makers of the note, the Plaintiffs could sue the bank for it, or whether their right of action would not be against the *New South Wales Bank*, whom they employed to collect the note. The question thus barely stated does not really arise, because it is not pretended that the bank did receive money specifically for the purpose of taking up the note. If the makers of the note had paid the money to the bank with an express direction that it should be appropriated to the payment of this note, then the point would have arisen which was decided in *De Bernales* v. *Fuller*. That case, which is reported in a note in the 14th East, 590, appears to be in some degree an exceptional one, and turned upon the precise circumstances existing in it. At first sight it seems opposed to the general rule that a principal cannot sue a sub-agent for want of privity existing between them. The case has been referred to in several later decisions. It has never been overruled, and it has been put on a ground on which it may stand by Mr. Justice *Maule*, in *Warwick* v. *Rogers* (1). He says:—"In *De Bernales* v. *Fuller* (2), where money was paid into a banking-house for the purpose of taking up a particular bill which was lying there for payment, it was held to be money had and received to the use of the then owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor who paid in the money, though the banker's clerk had said at the time the money was paid in that he would not give up the bill till he had seen his master. But that decision turned upon the fact that the money having been expressly paid into the Defendants' house for the specific purpose declared at the time of taking up that particular bill, and that purpose not having been directly repudiated till afterwards, it must be taken to have been received at the time for the use of the holder of the bill." It would seem, therefore, that the case may be supported on the ground that money had been paid in specifically for the payment of the particular bill, and had been accepted by the bankers for that purpose, and that they made themselves, by so accepting the money, agents to hold it for the Plaintiffs.

(1) 5 M. & G. 340. (2) 14 East, 590.

The general rule, however, was affirmed by two learned Lords in the House of Lords, in the case of *Mackersy* v. *Ramsays* (1). There two bills payable in *India* had been deposited by Mr. *Mackersy* with Messrs. *Ramsays*, who were bankers at *Edinburgh*, to collect for him. They sent the bills to their English correspondents, *Coutts & Co.*, and *Coutts & Co.* remitted them to their own correspondents, one to Messrs. *Palmer*, and the other to Messrs. *Alexander & Co.*, in *India*, to collect. Both bills were paid in *India*, one to Messrs. *Palmer*, and the other to Messrs. *Alexander*, but both these houses failed, and did not remit to *Coutts*. The House of Lords decided that Mr. *Mackersy* was entitled to recover the amount of the bills from Messrs. *Ramsays*, his own bankers in *Edinburgh*, as his principal agents, inasmuch as they were liable to him as soon as their sub-agents received the money; deciding, in fact, that the receipt of the sub-agents was, as between Mr. *Mackersy* and Messrs. *Ramsays*, the receipt of Messrs. *Ramsays*. In the course of giving judgment, Lord *Cottenham* said: "From the time the bills were sent to the Pursuers the Appellant did not interfere. It was not intended that he should do so, nor indeed could he have done so, as none of the intended agents acted under his authority; he therefore had no control over them. All that *Mackersy* undertook to do by the bills has been accomplished." Lord *Campbell* said: "*Mackersy* could not have interfered with the money either in the hands of *Alexander & Co.* or of *Coutts & Co.* There was no privity between him and either of those houses; but payment to *Alexander & Co.* was payment to *Coutts & Co.*, and payment to *Coutts & Co.* was payment to *Ramsays & Co.*

In the view which Lord *Campbell* entertained, no action could have been brought by Mr. *Mackersy* against either *Coutts & Co.* or *Palmer & Co.*, or *Alexander & Co.*, there being no privity between him and them which would have entitled him to sustain it.

There is a further difficulty in the way of the Plaintiffs suing the Defendants directly, and passing over his immediate agents, the *New South Wales Bank*. All that the Defendants apparently undertook to do was to place the amount of the bills when collected to the account of the *New South Wales Bank*, subject, it may be, to the accounts between the two banks.

(1) 9 Cl. & F. 818.

J. C. 1878 PRINCE v. ORIENTAL BANK CORPORATION.

In their Lordships' view, however, it is not necessary to determine the case upon the questions last referred to, because they are of opinion that neither the Plaintiffs nor the *New South Wales Bank* are entitled, for the reasons they have already given, to sue the *Oriental Bank* for money had and received to their use.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Supreme Court, with the costs of this appeal.

Solicitors for the Appellants: *Parker & Clarke.*
Solicitors for the Respondents: *Murray, Hutchins, & Co.*

[PRIVY COUNCIL.]

J. C.* 1878 Jan. 22, 23.

MARY ANN ELIZABETH PLATT AND ANOTHER . . . . . } APPELLANTS;

AND

THE ATTORNEY-GENERAL OF NEW SOUTH WALES . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Domicile of Choice—Animus manendi.

M. having abandoned his domicile of origin, which was in *Scotland*, acquired a new domicile in that portion of *New South Wales* which in 1859 was by proclamation separated therefrom and became the colony of *Queensland*. Thereafter he built in *New South Wales* a house suitable to his fortune, his wife and children residing there till his death, removing thereto from *Queensland*, he himself also residing there except at times when he was engaged upon his business or political duties in *Queensland*. He died, however, and was buried at his own wish in *Queensland*:—

Held, on a special case stating as above, that whether or not at the moment of separation in 1859 the domicile of *M.* was transferred to and became a domicile in *Queensland*, or continued to be a domicile in *New South Wales*, from the time the house built therein was finished, and the establishment of *M.* removed thereto, his *animus manendi* in *New South Wales* must be inferred, and his domicile there determined.

It is always material, in determining what is a man's domicile, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up.

APPEAL from a decision of the Supreme Court of *New South Wales* (March 28, 1876), that *John Donald McLean*, who died on

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

the 16th of December, 1866, and whose estate the Appellants represent as the executrix and surviving executor of his will, was domiciled at the time of his death in *New South Wales*.

The majority of the Court below, namely, *Martin*, C.J., and *Faucett*, J., held that the testator was so domiciled, whilst *Hargrave*, J., who dissented from that judgment, was of opinion that the testator never abandoned his domicile of origin, which was Scotch, or that, if he did, he had acquired a domicile of choice in the colony of *Queensland*, and not in that of *New South Wales*.

The information was brought to recover certain legacy and succession duties, payable to the Crown under the *Stamp Duties Act*, 1865, in force in the colony of *New South Wales*. The effect of the judgment of the Court below was that the testator's estate was held liable to those duties. The Appellants contended that the estate was not liable to those duties, on the ground that the testator was not, at the time of his death, domiciled in the colony of *New South Wales*.

Under an order of Court, made according to the *Common Law Procedure Act*, 1853, in force in the colony, a special case was agreed to, all the material facts of which appear in the judgment of their Lordships.

The *Attorney-General* (Sir *J. Holker*), Mr. *Kekewich*, Q.C. (Mr. *Cherry* with them), for the Appellants, contended that *McLean* was not domiciled in *New South Wales*. Prior to the separation in 1859 he contested unsuccessfully the electorate of *Darling Downs*, and took an active part in the separation of *Queensland*, and thereafter devoted a large share of his time and attention to its political affairs. The residence of *John Donald McLean's* wife and family, first at *Hawthornden* and afterwards at *Quiraing*, was due to her preferring *Sydney* to *Westbrook* on account of health, and for other reasons. There is nothing to shew that, except for his wife's sake, he wished to live at either place, and he never expressed any intention of abandoning his residence at *Westbrook*, or of residing permanently in *Sydney* or elsewhere in the colony of *New South Wales*, but, on the contrary, he at times spoke of adding to his house at *Westbrook*, for the purpose of residing there at a future time.

J. C.
1878
PLATT
v.
ATTORNEY-GENERAL OF NEW SOUTH WALES.

They argued that the facts and circumstances of the case favoured the conclusion that *McLean* was domiciled at the time of his death in *Queensland*. They referred to *Udny* v. *Udny* (1); *Forbes* v. *Forbes* (2); *Douglas* v. *Douglas* (3). Domicile is at a place, not in a country: see *Savigny's* Treatise on International Law, p. 54 (*Guthrie's* Translation). They referred also to *Aitchison* v. *Dixon* (4); *Dolphin* v. *Robins* (5); *Whicker* v. *Hume* (6); *Moorhouse* v. *Lord* (7).

The Solicitor-General (Sir *Hardinge Giffard*) and Mr. *W. W. Karslake*, for the Respondent, urged that admittedly *McLean* abandoned his domicile of origin and acquired a domicile of choice in *New South Wales* before the separation of *Queensland* from that colony, and that he never abandoned that domicile, but retained it till his death. Then upon the question what was his domicile after the separation of the two colonies in December, 1859, the facts which evidenced his *animus* were these: After the separation the testator's only home continued, as before, to be in *New South Wales*, and not elsewhere. His wife and family continued to live at *Hawthornden* so long as the lease of that house continued, and meantime the testator bought the site for and built the mansion of *Quiraing*, to which he removed his wife and family as soon as it was built. The testator lived in these two houses, and not elsewhere, when he was in the colony of *New South Wales*, and his children were born there, and his business transacted there. In other words, there, and there only, was his "home." It was submitted that in the consideration of the question of domicile, it was of no moment that the greater part of the testator's property was in *Queensland*, or that he spent a large portion of his time there, or that he was a member of the *Queensland* Legislature, and of its Government, or that he talked of enlarging the house at *Westbrook*, and expressed a wish to be buried there. From April, 1859, down to his death the house at *Westbrook* was occupied by another family, and he visited there only as a guest.

(1) Law Rep. 1 H. L., Sc. 441–457.
(2) Kay, 341.
(3) Law Rep. 12 Eq. 644.
(4) Law Rep. 10 Eq. 589.
(5) 7 H. L. C. 390.
(6) 7 H. L. C. 124, 160.
(7) 10 H. L. C. 286.

J. C.
1878
PLATT
v.
ATTORNEY-GENERAL OF NEW SOUTH WALES.

The circumstance that in all the deeds of partnership the testator reserved powers which would have enabled him at the determination of the partnership term to buy the partnership property by valuation or by auction, does not alter the fact that he never had a home at *Westbrook* or elsewhere in *Queensland* after April, 1859. It would hardly be contended that his residence at the *Brisbane Club*, when in *Queensland*, gave him a home there.

Domicile is in a country, not at a place. It is in the country to whose local law a man has voluntarily submitted himself. As used by our lawyers, it refers to, and determines, a man's *civil status*. Reference was made to *Savigny's* International Law, sect. 16, sub-s. 359, p. 90, and sect. 17, sub-s. 360; *Aitchison* v. *Dixon* (1); *Forbes* v. *Forbes* (2); *Maxwell* v. *Maclure* (3). A residence in another country, it was submitted, would not destroy a domicile of choice, when the *animus* was evidenced by retaining one residence in the country in which a man was domiciled.

With regard to the manner in which the separation of *Queensland* from *New South Wales* took place, reference was made to Imperial Act, 18 & 19 Vict. c. 54, and the scheduled Act 17 Vict. s. 46, and to the Letters Patent of 6th of June, 1859: see *Queensland* Statutes, vol. i. p. 238.

The *Attorney-General* (Sir *J. Holker*) in reply, relied upon *Maxwell* v. *Maclure*.

1878
Jan. 23.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a judgment or sentence of the Supreme Court of *New South Wales*, on an information instituted by the Attorney-General of that colony, for the recovery of certain legacy and succession duties which he alleges were due in consequence of the testator, *John Donald McLean*, having been domiciled at the time of his death in *New South Wales*. A majority of the Court held that *McLean* was domiciled in *New South Wales* at the time of his death, and, in consequence, that

(1) Law Rep. 10 Eq. 589, 596. (2) Kay, 359, 364.
(3) 6 Jur. (N.S.) 407.

J. C. 1878

PLATT v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

his executors were liable to pay the succession and legacy duties which were claimed by the Attorney-General. One of the learned Judges, however, differed in opinion, and thought that it was not established that *McLean* was domiciled at that place.

The facts are set out in a special case which was settled under the *Common Law Procedure Act* of *New South Wales*. From that case it appears that *McLean* was born in *Scotland* in the year 1820; that in the year 1837, when he was about seventeen years of age, he emigrated to *New South Wales* to join his brother, who had previously gone there; and that from the time of his arrival in *New South Wales* up to the time when he became of age, he was a squatter, and carried on the business of a sheep farmer. In the year 1848 he took up a station at *Acacia Creek*, on the *Darling Downs*, in that part of the colony of *New South Wales* which afterwards became and is now the colony of *Queensland*. No importance can be attached to his having taken up that station. He subsequently purchased a station or run on Crown lands called *Westbrook*, situate in the *Darling Downs* aforesaid, and occupied the house which was on the said station, and made it his home and place of residence. That was in the year 1851. At that time he was unmarried, and had no establishment elsewhere.

Their Lordships are of opinion that he abandoned his domicile of origin, which was in *Scotland*, the place of his birth and of his father's domicile, and that he gained a new domicile in *New South Wales*.

He continued to occupy the house at *Westbrook* down to the time of his marriage, which took place in *Sydney*, in September, 1855. After his marriage he resided with his wife at *Westbrook* for about four months, and then left *Australia* for *Europe* with the expressed intention of returning to *Westbrook*. He spent about three years in *Europe*, accompanied by his wife, and returned to *Australia* in April, 1859. After his return, and between the month of April, 1859, and the month of December in that year, when the colony of *Queensland* was separated from the colony of *New South Wales*, he resided with his wife and his then only child, first at *Westbrook* for about three months, and then as a lodger at the *Royal Hotel*, *Sydney*, for about three months; and subsequently, until the occupation of *Quiraing*, as hereinafter men-

tioned, his wife and family resided, and he also, when in *Sydney*, resided at a house called *Hawthornden*, near *Sydney*, which he had taken on lease for five years, and furnished. It also appears that in the month of April, 1859, he sold one-third share in the *Westbrook* station to the Defendant *William Beit*, the principal portion of the purchase-money being unpaid at the time of his death, and he and the said *William Beit* thereupon became partners in the station for a period of five years, and it formed part of the arrangement connected with the partnership that the said *William Beit* should during the continuance of the co-partnership reside at *Westbrook* in order to manage the station, subject to the inspection of the said *John Donald McLean*.

In December, 1859, a portion of the colony of *New South Wales* was by proclamation separated from that colony, and became the colony of *Queensland*, *Westbrook* being in that portion which became *Queensland*.

It is unnecessary to decide whether at the moment of the separation the domicile of *McLean* was transferred to and became a domicile in *Queensland*, or continued to be a domicile in *New South Wales*. Their Lordships have not to decide what was the domicile of *McLean* at the time of the separation of the two portions of the colony, but what was his domicile at the time of his death in 1866, seven years afterwards. The *status* of *McLean* at the time of the separation might have been a little uncertain, for at that time he was residing with his wife, or at least his wife was residing at *Hawthornden*, which he had taken for a period of five years; and there might have been a question, if he had died whilst his wife was residing at *Hawthornden*, whether, that residence having been taken for a limited period of five years only, he had acquired a new domicile by virtue of that residence. But he continued to live beyond the expiration of the lease of *Hawthornden;* and it is stated in the 22nd paragraph of the case that in the year 1861 or 1862 he purchased from three or four different persons the then unexpired terms of over ninety years of several leases for ninety years of land situated at the *Edgcliffe Road*, near *Sydney;* and that in January, 1863, he commenced to build a mansion-house, known as *Quiraing*, which was finally completed at a cost of about £16,000, and furnished in January, 1865. The

J. C.
1878
PLATT
v.
ATTORNEY-GENERAL OF NEW SOUTH WALES.

wife and family of *McLean* resided at *Hawthornden* until *Quiraing* was completed, and they commenced to occupy *Quiraing* on the 1st day of October, 1864, the lease of *Hawthornden* having then expired; and they continued to reside at *Quiraing* until the death of *McLean*.

Whether the erection of the house at *Quiraing* could so far explain the residence at *Hawthornden* as to lead to the inference that the residence at *Hawthornden* was intended to be the commencement of a permanent residence in *Sydney* or not is not material, because when he purchased the land and built the house at *Quiraing* he had then got, for a period of ninety years, a house suitable to his then fortune of about £200,000. At *Quiraing*, as well as at *Hawthornden*, he maintained a large establishment suitable to his then station in life, and his wife and family continued to reside there up to the time of his death, he also residing there with them whenever he went to *Sydney*. So that, even if at the time when *Queensland* was formed into a separate colony he had acquired a domicile of choice in that colony, and had not then acquired a new domicile in *New South Wales* by virtue of his residence at *Hawthornden*, there is sufficient evidence from which it is to be presumed that before his death he acquired a new domicile of choice in *New South Wales*.

Lord *Westbury*, in the case of *Udny* v. *Udny* (1), says: "Domicile of choice is a conclusion or inference which the law draws from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness, and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation." Then his Lordship proceeds to make a remark which is peculiarly applicable to this case as regards the residence at *Hawthornden* during the lease for five years, and the subsequent building of the house at *Quiraing*. He says:—"It is true that residence originally

(1) Law Rep. 1 H. L., Sc. 458.

temporary or intended for a limited period may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established."

Now, as soon as the house at *Quiraing* was built and furnished, and *McLean's* establishment was removed from *Hawthornden* to the house which he had built at a large cost; at which he kept up a large establishment suitable to his fortune; where his wife and children resided, and where he went except at times when he was engaged upon his business or political duties in *Queensland*,—from that time at least, as it appears to their Lordships, his change of purpose or *animus manendi* in the colony of *New South Wales* is to be inferred. From that time it is to be presumed that the house at *Quiraing* was his home.

In the case of *Maxwell* v. *Maclure* (1), which has been referred to in the course of the argument, the person whose domicile was in question retained his house at *Wigan*, as well as the new house which he had got in *Scotland;* but in this case *McLean* had no house nor any establishment in any other place than at *Quiraing*. When he went to *Queensland* for the purpose of carrying on his political duties he resided at a club; he had no establishment. When he went to *Westbrook* for the purpose of inspecting the run, and the business which was carried on there by his partner *Beit*, *Beit* was living in the house. *McLean* went there sometimes for a few days, and sometimes for a week or two, and stopped in the house with *Beit* and his wife so long as *Beit's* wife was living, and afterwards with *Beit* alone; but he had no establishment there of his own; it was not his home. His residence was at *Quiraing*, where his wife and children were living. That is the place to which it is to be presumed he would have gone if he had been incapacitated for business or public duties. It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up.

It is said that *McLean* at times spoke of adding to the house at *Westbrook* for the purpose of residing there at a future time, and that he also expressed his wish to be buried at *Westbrook*. But an

(1) 6 Jur. (N.S.) 407.

J. C. 1878

PLATT v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

intention not executed cannot countervail the facts already adverted to. And in this case his intention of adding to the house, if he ever had that intention, was never executed, and he never appropriated that place to the residence of his wife and family. The expression of his wish to be buried at *Westbrook* does not appear to be a very important circumstance. In the case of *Douglas* v. *Douglas* (1), the person whose domicile was in question was buried in *Scotland*, but it was held, notwithstanding, that his domicile was in *England*. It must certainly often occur that a person who is permanently residing in one place may have a vault or some place where he may wish to be buried among his ancestors, but that does not affect his domicile.

McLean died suddenly at *Westbrook*. He had no opportunity of returning to *Quiraing*. His death and burial at *Westbrook*, therefore, do not rebut the inference that he had made *Quiraing* his permanent residence and his home.

Under these circumstances their Lordships are of opinion that the view taken of the case by the majority of the Supreme Court of *New South Wales* was the correct one, and they will humbly recommend Her Majesty to affirm the decision of that Court, with the costs of this appeal.

Solicitors for the Appellants: *White, Broughton, & White.*
Solicitors for the Respondent: *Peachey & White.*

(1) Law Rep. 12 Eq. 630.

[PRIVY COUNCIL.]

THOMAS KERSHAW . . . . . DEFENDANT; J. C.*

AND 1878

JOHN E. KIRKPATRICK AND ANOTHER . . PLAINTIFFS. *Jan.* 24, 25.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (CANADA).

Canadian Civil Code—Appropriation of Payments—Rescission of Appropriation.

The giving of a cheque by the debtor with the intention of appropriating it to the debt of the Plaintiffs, and the giving of a receipt therefor by the Plaintiffs' agent, acting within the scope of his authority, constitute by the law of *Canada* an appropriation as intended. Such appropriation could only be changed by a rescission of the appropriation made by consent of all parties interested.

In an action against the agent for moneys had and received on account of the Plaintiffs, such rescission, being put on the footing of a contract by the Canadian law, must be specially pleaded as a defence.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Sept. 15, 1876), affirming a judgment of the Superior Court for *Lower Canada*, in the district of *Montreal* (Feb. 17, 1875).

The action was brought by the Respondents in the Superior Court to recover from the Appellant $8000, which the Respondents alleged that the Appellant had received on their account from *James B. Stevenson* as part of the price of some wheat purchased by the said *J. B. Stevenson* from the Respondents through the Appellant as broker.

The writ was issued in the Superior Court on the 18th of September, 1874, and annexed to the writ was a declaration which alleged that on or about the 13th of July, 1874, the Appellant, as a broker, bought on account of *James B. Stevenson* from the Plaintiffs about 13,000 bushels of Amber *Michigan* wheat, at $1.25 per bushel, payable cash on delivery; that, on the 15th of July, 1874, 8127½ bushels of the said wheat were delivered to *Stevenson*, and

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1878 KERSHAW v. KIRKPATRICK.

the remainder on the following day, the whole through the Appellant as broker. That on the 15th of July, 1874, the Appellant, as the agent of the Respondents, rendered an account for the 8127½ bushels of wheat to *Stevenson*, and that *Stevenson* on the 18th of July paid Appellant on account of the Respondents $8000, which Appellant received and credited upon the said account, which sum the Appellant often acknowledged to owe, and promised to pay Respondents, but had failed to do so.

The declaration contained also an ordinary assumpsit count for the same sum.

To this declaration the Appellant pleaded generally, denying all the allegations, matters, and things set forth in it, and issue being thus joined the parties proceeded to evidence.

The only question between the parties was, whether a particular sum of $8000, paid by the said *James B. Stevenson* to one *Benac*, clerk to the Defendant, was so paid as to be appropriated irrevocably to a debt of $16,195 due from *Stevenson* to the Plaintiffs.

The facts are sufficiently set forth in the judgment of their Lordships.

Mr. *Watkin Williams*, Q.C., and Mr. *R. Vaughan Williams*, for the Appellant, contended that the judgments of the Court below were contrary to the evidence; that the defence disclosed by the evidence was inadmissible on the pleadings; that *Stevenson* never intended to appropriate, and did not in fact appropriate, the payment to the account of the Respondents; but that the Appellant and his clerk had refused to receive the money on the terms of such appropriation.

Mr. *Matthews*, Q.C., and Mr. *W. W. Kerr*, for the Respondents, contended that it was shewn in the clearest manner by the evidence that *Stevenson & Co.* paid $8000 to the clerk of *Thomas Kershaw* on account of the Respondents, and that credit was given therefor in the account furnished by *Thomas Kershaw*. Such imputation of payment on account of the Respondents was, therefore, made by the debtor at the time the payment was made, and the receipt therefor was given by the clerk of *Thomas Kershaw* at the same time, and remains as evidence of the appropriation. Reference was made to the *Civil Code of Canada*, Arts. 1158–1161;

Demolombe, Traité de Contrat, vol. v. pp. 1–30, upon *Code Napoléon*, Arts. 1253 *et seq.*; see Arts. of *Demolombe*, 5, 37; *Larombière* on Contracts, Art. 1253; *Pothier, Traité d'Obligations*, pt. III. c. 1, Art. 7, where it is said that although a creditor must make his imputation in a particular form, the debtor need not do so. [SIR BARNES PEACOCK referred to Art. 1234 of *Civil Code of Canada* to shew that the terms of a written receipt could not be varied by parol evidence.]

Mr. *Watkin Williams*, Q.C., replied:—

Finality of appropriation is obtained so soon as payment is accomplished, but not before; see *Pothier*, pt. III. c. 1, Art. 7, § 565. The moment of payment is not when the cheque is given but when the cheque is cleared. With the exception of the technical requisites of the Civil Code as to the reception of evidence, there is no difference between Canadian and English law on the subject of appropriation of payment. Both laws give to the debtor the right to appropriate; on his failing to do so, then to the creditor; and on both failing both laws determine the appropriation. If the right devolves upon the creditor, then under the Canadian law he fixes it in his receipt. If the transaction is completed it cannot be re-opened; if no receipt fixing the appropriation is given, then the law operates. Art. 1234 does not touch this case. The Appellant does not seek to vary the receipt but to exclude it altogether.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This was an action for money had and received, to which the general issue was pleaded. The question in the cause may be shortly stated to have been the appropriation of a payment, on which the Lower Court, and the Court of Queen's Bench, have found in favour of the Plaintiff.

The material facts of the case are as follows: Mr. *Kershaw*, the Defendant, a broker, bought a cargo of wheat as a broker from the Plaintiffs, *Kirkpatrick & Co.*, for and on behalf of a firm named *Stevenson*. The quantity of wheat bought was on the whole some

J.C. 1878 KERSHAW v. KIRKPATRICK.

13,000 bushels. There was, however, a separate invoice with respect to 8127 bushels, the price of which amounted to $10,000 and some dollars.

Mr. *Kershaw* had also acted as broker in another transaction whereby *Stevenson* became the purchaser of the cargo of another vessel called the *Europe*, of which the price was some $17,000. In this cargo *Kershaw* appears to have had some interest himself, but it had been pledged to the *Bank of Montreal*, who were the ostensible vendors. On these two accounts a sum of about $37,000 was due from *Stevenson* to *Kershaw* on the 18th of July, 1874. On that day *Kershaw* sent his clerk, a Mr. *Benac*, to *Stevenson's* office to get what money he could on account. Mr. *Stevenson*, the Plaintiff's principal witness, gives the following account of what then took place. He says, "Mr. *Benac*, Mr. *Kershaw's* clerk, who is in the habit of acting for him sometimes, came into the office and asked me how much I could give him, and I told him I did not know. I would give him as much as I could. There was some mention of $20,000 or $30,000. I said I could not give him much that day. He went away, and in a few minutes came back again, when I told him I had been disappointed in getting money. I drew a cheque for $8000, and handed it to Mr. *Benac*. That account paper 'B' being with a lot of other accounts, I handed the account to Mr. *Benac* with a cheque, and he marked the words 'July 18th, cash on account, *P. Benac*, $8000.'" In the case that document is set out. It is an invoice of wheat sold by *Kirkpatrick & Co. to Stevenson*, of the 15th of July, and runs in this way: "8127$\frac{30}{60}$ Bushels Amber *Michigan* Wheat ex barge '*Swan*' into '*Elizabeth Alice*,' at 1.25 = ... $10,159. 37

Brokerage 40. 63

$10,200. 00"

Below the $10,200. 00 is the entry "July 18th, cash on account with the bank $8000," which is what this witness referred to as having been written by Mr. *Benac* at that time on this invoice. It may be here observed that it was not written on the back of the invoice, but on the face of it and under the figures which have been referred to. There are in this exhibit also the words "Balance,

$2200." But it does not appear distinctly when and where those words, which are in pencil, were written. Mr. *Stevenson* goes on to say, "The invoice, after the money was paid and the receipt written, was in the same state as it is now, with the exception of some figures in pencil. I fancy the cheque I gave was paid. It was on the *Union Bank*." He identifies the cheque. Cross-examined, he says, "The wheat was from the barge *Swan*. I employed Mr. *Kershaw* to buy the wheat. He was my broker. Mr. *Benac*, when he came for the money, said, as near as I can recollect, 'Is that all you can give me,' and I gave him the cheque for the $8000. The first time he came was the 18th of July, about 12 o'clock. He asked me how much I could give him, and I said I could not tell. He then said, 'How much do you expect?' and I said '$20,000 or $30,000.'" That is all that transpired at that interview. He came back again about half-past twelve. He said, 'How much can you give me?' I said, 'So far I have only been able to get $8000 or $9000,' and I handed him the account and a cheque. He made some remark about not taking it on that account." (It should be observed that Mr. *Benac*, when called, does not in any way corroborate this latter statement.) "His precise words when he came in were, 'How much can you give me?' and I said, 'Take that in the meantime, and I will see if I can do any more.'" He says, further on, *Benac* returned in about ten minutes, "and said that Mr. *Kershaw* would not receive that upon account of the *Swan's* cargo; that is Plaintiff's debt; and to change the receipt. I said to *Benac*, 'I am going away, we can leave that until Monday.' He said the $8000 was not to be on account of *Kirkpatrick* and *Cookson*, but on account of the *Europe*, which was an older debt of some days before. I said I was just going away, and I would see and straighten it upon Monday. I was going away early, at half-past one. I was going to the country to *St. Hilaire* by the 2 o'clock train. That is all that transpired on the Saturday between me and *Benac*."

Then he goes on to speak of what subsequently took place. "I received a visit from *Kirkpatrick* that afternoon about ten minutes after *Benac* was gone. Mr. *Kirkpatrick* came to my office, and asked for some money on that debt of the *Swan*. I said I could not give him the whole. He said, 'Give me some.' I said, 'I have given

J. C. 1878 KERSHAW v. KIRKPATRICK.

Mr. *Kershaw* all I had, and I suppose he will give you some.' That was all that transpired at that interview. Mr. *Kirkpatrick* then went away, but came back in five or ten minutes. I fancy, from the direction which I saw him coming from, that he went to Mr. *Kershaw's*. He said that Mr. *Kershaw* had said that he had no money for him. I said I supposed he had applied it to some other account. He then asked me if I could not give him some, and I then gave him a cheque, I think, for $4000. I did not take a receipt for that payment, to the best of my recollection. The cheque was made payable to the firm's order. I do not recollect whether it was that Saturday or the Monday following that he told me that he would look to me for the account. He said I was not to pay any more money to Mr. *Kershaw*, but that he looked to me for the entire amount of the wheat purchased. I paid Mr. *Kirkpatrick* afterwards $5000, either on the Monday or the Tuesday following." Then the question is put, "Is it not a fact that Mr. *Kirkpatrick*, time after time, and after payment by you of $4000 or $5000, dunned you for the payment of the balance of the cargo of the *Swan*? *A.* Yes, on several occasions he asked me for the balance. I saw Mr. *Kershaw* on the Monday. He told me that he had sent *Benac* over to say that he would not accept that payment on account of *Kirkpatrick* and *Cookson*, and to cancel that receipt and put it to the account of the *Europe* which was due long before that to which he had paid it. I said it was no use doing anything about the matter, it could easily be explained. He said the money was for the *Europe's* cargo, which was due before that, and that he had sent *Benac* over to say so. I refused to cancel it. I did not think it was worth while to cancel it. I said to Mr. *Kershaw* it was much better to leave it as it was and explain the circumstances. I got the *Europe's* wheat from Mr. *Kershaw*, who had given a 'bailee' receipt to the *Bank of Montreal*." Then he says, "When Mr. *Kirkpatrick* came to my office I told him that the $8000 I had paid I expected Mr. *Kershaw* would give him some of it. I did say in my deposition before the police magistrate that I said to Mr. *Kirkpatrick* that I expected the $8000 I had given to *Benac* was for him (*Kirkpatrick*). I had previously promised *Kirkpatrick* to pay him his account on that day." Then there is a little explanation on his re-cross-examina-

tion, the question being, "You have stated in answer to Mr. *Kerr* that you have sworn in your deposition at the Police Court that you had told Mr. *Kirkpatrick*, on the 18th of July, that you were under the impression that you had paid Mr. *Benac* $8000, which you expected was for him, did you not also state, to complete the same sentence which did not end there, the following words, 'But as there were other accounts running between Mr. *Kershaw* and me that it had been applied to something else?' *A.* I did."

There is also the evidence of *Benac*, which does not throw much more light upon the main question in the cause, how and under what circumstances the invoice was given to him, and he wrote the receipt. He gives a short account of what took place at the interview, but without stating the circumstances under which he received the invoice or wrote upon it. He only refers to it incidentally by saying, "I brought back the cheque to the office and handed it to Mr. *Kershaw*. Mr. *Kershaw* asked me if it was intended for any particular account. I said to Mr. *Kershaw*, 'No; Mr. *Stevenson* did not tell me anything about it, but I think I gave a receipt for the money on Mr. *Kirkpatrick's* invoice.'" Then he further says, "I was in a great hurry, and I took the first invoice in order to acknowledge the sum which I received from *Stevenson*. It was merely accidental; if it had been another account it would have been the same thing. There were a lot of accounts together. Generally we do the same thing in all the houses where we are doing business." This does not appear to their Lordships a very probable statement, considering the importance attached by the Canadian law, somewhat greater than that attached by our law, to instruments of this description.

The judgments of the two Courts are very short. The first is the judgment of Mr. Justice *Mackay*, who, as their Lordships understand, had the witnesses before him. It consists, as far as the decision on the point in the cause is concerned, in these words: "Considering that the Defendant on the 18th day of July last received $8000, money for Plaintiffs, as alleged from *J. B. Stevenson & Co.*, purchasers of Plaintiffs' wheat, that at the time of payment of it *J. B. Stevenson & Co.* meant it for Plaintiffs." Their Lordships therefore observe that Mr. Justice *Mackay* finds as a fact that the money was meant, that is, meant by *Stevenson*,

J. C. 1878 KERSHAW v. KIRKPATRICK.

for the Plaintiffs. He goes on to say, "And Defendant so expressed it by the account rendered and receipt given to the said *J. B. Stevenson & Co.* on the said 18th day of July last, against which Defendant cannot go, certainly not under his plea pleaded (mere general issue)."

Their Lordships do not read this judgment as ruling that the receipt *per se* would be conclusive, and that the Plaintiff could not go against it; but that the receipt having been given, effectuating the intention of the parties, or at all events the intention of the debtor, who had a right to appropriate the payment, it cannot be impugned at all events under these pleadings.

The judgment of the Court of Queen's Bench recites what seemed to the Court the most material facts thus: "On the 15th of July, 1874, the said *Thomas Kershaw*, acting as agent of the Respondents, rendered to the said *J. B. Stevenson & Co.* an account for 8127½ bushels of Amber *Michigan* wheat so sold and delivered to the said *J. B. Stevenson & Co.* by the Respondents, together with his account for brokerage, making in all the sum of $10,200. On the 18th of July, 1874, the said *Thomas Kershaw* sent his clerk to the said *J. B. Stevenson & Co.* to get some money; the clerk received $8000, and gave a receipt on account of the Respondent's wheat. When he returned the said *Thomas Kershaw* asked him if the $8000 was on any particular account. The clerk replied that he thought he had given a receipt on account of the Respondent's cargo of wheat, upon which the said *Thomas Kershaw* replied, 'Go back and tell *Stevenson*.'" After reciting the judgment of the Court below, the Court of Queen's Bench proceed to say, "The Court here see no reason to alter the judgment of the Court below. The imputation was made by the parties at the time the receipt was given, and to this date this receipt remains in evidence that *Stevenson* paid the $8000 to Appellant on account of amount due to Respondents."

The law of *Canada* with respect to the appropriation of payments appears not to differ materially from the law of this country. It is contained in the sect. 1158 and the following sections of their Civil Code. Sect. 1158 is in these terms:—"A debtor of several debts has the right of declaring, when he pays, what debt he means to discharge." This is very much a repetition of a

similar provision in the *Code Napoléon*, the commentators on which paraphrase the expression "when he pays" by the expression "at the instant or the moment of payment." Sect. 1160 runs thus:—"When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specifically of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided," which are to be found in Article 991, which declares that contracts may be avoided on the ground of fraud and error, and other grounds very similar to those on which they are avoidable in this country. Then section 1161 says:—"When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying," and so on. The only observation their Lordships think it necessary to make upon these provisions in the Code is, that they seem to attach somewhat more importance, as indeed the *Code Napoléon* does, to the written evidence of an appropriation than is attached to it in this country, the object being, no doubt, as far as possible to avoid contradictions of parol evidence.

Such being the facts of this case, and the law applicable to them, their Lordships have to determine, not what decision they might have come to if they had heard the case as a Court of first instance, but whether it has been established that the Courts below were wrong in their findings, which their Lordships regard as in a great measure findings of fact.

Undoubtedly the evidence of *Stevenson* and of *Benac* was far from satisfactory, and it is open to argument upon that evidence that the choice of the particular invoice on which the receipt was written was merely a matter of chance, without the intention of appropriating the payment to any particular debt. But there having been a finding of fact in both Courts that it was the intention of *Stevenson* to appropriate the payment to the debt of the Plaintiff, their Lordships are unable to say that the evidence did not warrant such a finding. Assuming this intention, they agree with the Courts that upon the giving of the cheque by *Stevenson*, and the receipt by *Benac*, who was sent by Mr. *Kershaw* for the

J. C. 1878 KERSHAW v. KIRKPATRICK.

purpose of receiving the money, and would therefore be acting within the scope of his authority in giving the receipt, there was an appropriation of the payment to the debt of the Plaintiffs. That being so, Mr. *Kershaw* himself could not change the appropriation, although he appears to have desired to do so.

But it has been contended that there was a change of the appropriation by the consent of *Stevenson* and *Kirkpatrick*.

Their Lordships do not think it necessary to determine whether, considering that *Kershaw* received this payment on behalf of a third person, an agreement by *Kershaw* and *Stevenson* could have had the effect of changing the appropriation of the payment as against *Kirkpatrick*, because they concur in what they understand to be the finding of the Court of Queen's Bench, that *Stevenson* did not agree to any change of the appropriation of the payment. He appears to have given an evasive answer upon the Saturday, and to have spoken again evasively upon the Monday. But the fact remains that he refused to alter the receipt, and their Lordships do not think the Court wrong in attaching great weight to the fact that the receipt remained in the terms in which it was originally written.

It has been further contended, that what took place between *Kirkpatrick*, *Stevenson*, and *Kershaw* on the Monday amounted to an agreement of all the parties to a change in the appropriation of the payment. It is true that Mr. *Kirkpatrick* appears to have tried to get as much as he possibly could, and to have got somewhat too much, which possibly he will have to account for to *Stevenson's* estate. But be that as it may, it does not appear to be made out that there was any rescission of the appropriation of payment by the consent of all parties. Their Lordships are further disposed to think that if such a defence had been set up it ought to have been specially pleaded, as the rescission of a contract is required to be by the Code of Civil Procedure, the appropriation of a payment being put upon the footing of a contract by the Canadian law.

Their Lordships think it right to say that no imputation can properly be made against Mr. *Kershaw* for his conduct. Considering that Mr. *Kirkpatrick* received the sums which he did from Mr. *Stevenson*, and having regard to all the circumstances,

J. C.
1878
KERSHAW
v.
KIRKPATRICK.

Mr. *Kershaw* may very well have thought that this was a case in which he was justified in taking the opinion of the Courts.

For these reasons their Lordships will humbly advise Her Majesty that the decision of the Queen's Bench in *Canada* be affirmed, and this appeal be dismissed with costs.

Solicitors for the Appellant: *Ingle, Cooper, & Holmes.*

Solicitors for the Respondents: *Simpson, Hammond, & Co.*

[PRIVY COUNCIL.]

J. C.*
1878
Jan. 26, 29;
Feb. 22.

IN THE MATTER OF THE WILL AND CODICIL OF CHARLES HENRY ARMYTAGE, DECEASED,

AND

IN THE MATTER OF VICTORIAN ACT, 15 VICT. No. 10.

CAROLINE M. ARMYTAGE AND OTHERS. . APPELLANTS;

AND

FREDERICK WILKINSON, MASTER IN EQUITY OF THE SUPREME COURT . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA, PROBATE JURISDICTION.

Victorian Master in Equity—Probate Duty—Mandamus—Construction of Will—Vested Interest—Act No. 388, *s.* 24.

The Supreme Court of *Victoria* has power to make an order of a mandatory character upon the Master in Equity in relatio n to duties claimed by him under Act No. 388, whether in his capacity of an officer of the Court or of a revenue officer responsible to the Crown.

Reg. v. *Lords of the Treasury* (1) distinguished.

A testator directed the trustees of his will to hold a certain fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years and of a daughter or daughters at that age or marriage":—

Held, that the shares of the children were on the death of the testator vested in interest though subject to be divested. "Vest" may, if the con-

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 7 Q. B. 387.

J. C.
1878
ARMYTAGE
v.
WILKINSON.

text of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become absolute and indefeasible.

Where the whole beneficial interest in the testator's estate was under his will vested in his widow and children, with a limitation in favour of his grandchildren, the defeasible character of each child's interest only affecting the shares of the children or grandchildren *inter se*, with a gift over on the happening of a contingency, probate must be delivered on payment of duty at the rate of 5 per cent., notwithstanding that additional duty is payable on the gift over taking effect.

Quære, whether this would not also have been the case had the shares of the children not been vested in interest.

Re Thomas Willsmore's Estate (1) commented upon.

Sect. 24, Act No. 388, is not to be construed strictly against those who invoke its benefit, because it establishes an exception to a general rule.

APPEAL from an order (Dec. 13, 1876) of *Molesworth*, J., exercising the probate jurisdiction of the Supreme Court of *Victoria*.

The testator died on the 19th of April, 1876, leaving a will and codicil dated the 7th of February, 1870, both of which are sufficiently set forth in the judgment of their Lordships.

The question on this appeal was whether the estate of the testator (all of which he devised and bequeathed in favour of his wife and children, subject however in certain contingencies to gifts over in favour of other persons) was to any, and if any, to what extent chargeable with more than one-half of the duty mentioned in the schedule to *Victoria* Act No. 523; and it depended on the meaning and effect to be given to sect. 24 of Act No. 388.

By the Act No. 388 (sect. 7, sub-sect. 2), every executor is required to file in the office of the Master in Equity a statement specifying the particulars of the personal estate of or to which the deceased was at his death possessed or entitled, and of the real estate comprised in such will, and the value thereof, and of the debts due by the deceased, and shewing the balance remaining after deducting the amount of the debts from the value of the estate of the testator, and it is enacted (sect. 8) that except as therein otherwise provided, there shall be paid to the Master, to be by him paid into the consolidated revenue of the colony, by every executor, the duty mentioned in the schedule to the Act,

(1) 2 Vict. L. R. Insol. & Prob. Cas. 30.

which duty is to be calculated upon the final balance appearing upon his statement. It is further provided (sect. 10) that the duty payable under the Act shall be deemed to be a debt of the testator to Her Majesty, and shall be paid by any executor out of the personal estate, after testamentary and funeral expenses, in priority to all debts of the testator.

Sect. 24 of the Act No. 388 (on which the question in this appeal turned) is as follows:—"When any person dies intestate, leaving a widow and children the only persons entitled in distribution to his estate, the duty shall be calculated at one-half only of the percentage mentioned in the schedule; when any person dies intestate, leaving a widow and no children, the duty shall be calculated so as to charge one-half only of the duty upon the distributive share of such widow; when the widow of a testator, or widow and children of a testator, or children of a testator, are the only persons entitled under his will, the duty shall be calculated at one-half only of the percentage mentioned in the schedule, and when other persons are entitled under such will, the duty shall be calculated so as to charge only one-half of the percentage mentioned in the schedule upon the property demised or bequeathed to the widow of a testator, or widow and children of a testator, or children of a testator." By the 2nd section of the Act No. 403 (*The Duties on Estates Amendment Act*, 1871), it was enacted that the word "children" in the 24th section of Act No. 388 should be construed to mean and include grandchildren.

The duties mentioned in the schedule to Act No. 388 varied according to the amount of the estate, real and personal, of the deceased; and in all cases where such amount was over the value of £20,000, the duty was 5 per cent. By the Act No. 533 (which is to be read and continued as one with the Act No. 388, and commenced and took effect on and from the 24th of February, 1876), the provisions of the schedule to the Act No. 388, in so far as it related to estates exceeding £20,000 in value, were repealed; and there was substituted, in lieu of the duty thereby imposed, a duty of 10 per cent. in all cases where the amount of the estate is over £100,000.

On the 6th of July, 1876, probate of the will and codicil of the testator was granted by the Supreme Court of the Colony to the

J. C. 1878 ARMYTAGE v. WILKINSON.

Appellants *Caroline Morrel Armytage* and *George Fairbairn*, leave being reserved to the other executors named in the will to come in and prove the same; and on the 29th of November, 1876, in pursuance of such leave, probate of the will and codicil was granted to the Appellant, *Frederick William Armytage*.

The Appellants, *Caroline Morrel Armytage* and *George Fairbairn*, duly filed in the office of the Master in Equity the statement required by the Act No. 388, and it thereby appeared that after deducting the amount of the debts due by the testator from the value of the estate there remained a balance of £121,471 0*s*. 11½*d*., and that the value of the properties bequeathed by the will to the widow of the testator amounted altogether to the sum of £47,545 10*s*. 5*d*.

The Master in Equity required the Appellants to pay duty at the rate of £10 per cent. on £73,925 10*s*. 6½*d*., and at the rate of £5 per cent. on £47,545 10*s*. 5*d*. (the widow's share of the testator's estate), while the Appellants contended that the whole estate, or at all events the value of the interests given to the widow and children of the testator, should pay duty only at the rate of £5 per cent., being half the percentage mentioned in the schedule to Act No. 523.

The 12th section of Act No. 388 enacts that no probate shall issue from the Master's office until the duty under the Act has been paid, and that the Master shall certify by endorsement on every probate that the duty has been paid and the amount thereof.

The Appellants, on the 7th of December, 1876, obtained a rule *nisi* calling on the Respondent, the Master in Equity, to shew cause, on the 13th of December, 1876, why an order should not be made directing him to issue probate, upon payment of duty at the rate of half the percentage mentioned in the schedule to the Act No. 523, in accordance with sect. 24 of *The Duties on the Estates of Deceased Persons Statute*, 1870.

On the 13th of December, 1876, no counsel appeared for the Respondent; but Mr. Justice *Molesworth*, after hearing counsel for the Appellants, decided that the full amount of duty claimed by the Respondent was payable, and made an order discharging the rule *nisi*.

Mr. *Benjamin*, Q.C., and Mr. *Stirling*, for the Appellants, submitted that according to the true construction of the testator's will the interests thereby given to his children vested at his death, and were only liable to be divested in the event, as regards a son, of his dying under the age of twenty-one, and as regards a daughter, of her dying under that age or before marriage. They referred to *Taylor* v. *Frobisher* (1); *In re Edmondson's Estate* (2); *Umbers* v. *Jaggard* (3). Sect. 24 of Act No. 388 is not to be construed strictly against those who invoke its benefit merely because it introduces an exemption in favour of a particular class from a charge which is otherwise of general application: *Warrington* v. *Furbor* (4); *Hobson* v. *Neale* (5). They contended that the Acts Nos. 388, 403, and 533, ought to be construed so as to impose the least burden on Her Majesty's subjects; and, according to the true construction thereof, duty ought to be calculated on the value of the testator's estate (or, at all events, on the value of the interests devised and bequeathed to the widow and children and grandchildren of the testator) at the rate of £5 per cent. only. Act No. 388 provides that when the widow of a testator, or the widow and children of a a testator, or children of a testator, are the only persons entitled under his will, the duty shall be calculated at one-half only of a certain percentage. Under the decision appealed from the duty has been calculated at the full percentage, notwithstanding that the testator's widow and children were, at the time when the duty had to be calculated, the only persons entitled under his will. Again, Act No. 388 provides that, even when other persons than the widow or children, or widow and children, of a testator are entitled under his will, the duty shall be calculated so as to charge only one-half of a certain percentage upon the property devised or bequeathed to the widow of a testator, or widow and children of a testator, or children of a testator. But under the decision appealed from the duty has been calculated so as to charge the full percentage, and not one-half thereof only, on property devised and bequeathed to the children or widow and children of the testator.

(1) 5 De G. & Sm. 191.
(2) Law Rep. 5 Eq. 389.
(3) Law Rep. 9 Eq. 200.
(4) 8 East, 242.
(5) 17 Beav. 185.

J. C. 1878 ARMYTAGE v. WILKINSON.

Upon the question of jurisdiction raised in the Respondent's case they pointed out that the Defendant was an officer of Court (see 15 Vict. No. 10, and Rules made under that Act, c. 1, and c. 8, 3 Vict. Stat. p. 267), and referred to the Act of 1872, No. 427, s. 3, which constituted the Supreme Court a Probate Court. In *Bell* v. *Master in Equity* (1) the Privy Council had itself decided a case arising under Acts 388 and 523 in relation to the amount of duty chargeable on the estate of a deceased person.

The Attorney-General (Sir *J. Holker*), and Sir *J. Stephen*, Q.C. (Mr. *C. Bowen* with them), for the Respondent, submitted that "the Court had no jurisdiction in the matter," nor any power to make absolute a rule for a mandamus to the Master. The Supreme Court itself had taken that view in former cases, that a mandamus or any order of that nature commanding the Master in Equity to receive a particular amount, and indorse probate with that amount, will not lie: see *In re the Will of Thomas Willsmore* (2); *In re Hamilton* (3). [Mr. *Stirling* referred to the report of the application made in the present case in 2 Vict. L. R., July No.] Act No. 388, ss. 8, 9, shew in what capacity the Master acted in this case, viz., that of a collector of revenue: see also *King* v. *The Commissioners of Customs* (4); *Tapping* on Mandamus [ed. 1848], p. 115. "A writ does not lie to command the commissioners of customs, &c., although they act wrongfully by withholding goods or by the doing of any other tortious act; for to grant a mandamus in such a case would be in effect to grant the writ against the Crown or its officers, which legally cannot be;" *The Queen* v. *The Lords of the Treasury* (5). A writ of mandamus, moreover, will not lie where there is another remedy. Upon the right construction of sect. 24, Act No. 388, the Appellants ought to pay full duty and not half duty. Upon the meaning of the word "entitled," reference was made to *Umbers* v. *Jaggard* (6), *Taylor* v. *Frobisher* (7), and *In re Edmondson's Trusts* (8), referred to on the other side. They shew that "vested" may be used in

(1) Law Rep. 2 App. Cas. 560.
(2) 2 Vict. L. R. 1876, Insol. & Prob. Cas. 30.
(3) 3 Austr. Jur. 95.
(4) 5 A. & E. 380.
(5) Law Rep. 7 Q. B. 387.
(6) Law Rep. 9 Eq. 200.
(7) 5 De G. & Sm. 191.
(8) Law Rep. 5 Eq. 389.

one of two different senses, either as implying an indefeasible right to future enjoyment, or a present right to future enjoyment. It did not make much difference whether the interests in this case were vested or not. There was a contingency, and the Act does not deal either with estates in property or with contingent interests therein: see *Jarman* on Wills [3rd ed.], vol. i. p, 806.

J. C. 1878 ARMYTAGE v. WILKINSON.

Mr. *Benjamin*, Q.C., replied.

The judgment of their Lordships was delivered by

1878 *Feb.* 22.

SIR JAMES W. COLVILE:—

The question which this appeal seeks to have determined is the rate of duty, in the nature of probate duty, which is chargeable upon the estate of the late Mr. *Charles Henry Armytage*, who died in the colony of *Victoria*, testate, on the 19th of April, 1876. He left a widow, the first-named of the Appellants; several children, all of whom were at the date of their father's death under age and unmarried; and a considerable fortune, it being an admitted fact, material to the determination of the question raised by the appeal, that the residue of his estate, after deducting the amount of the debts due by him, exceeded the sum of £121,000.

By his will, dated the 7th of February, 1870, after vesting all his estate, real and personal, in his wife and five other persons, as trustees, executrix, and executors, upon certain trusts, for sale, management, collection and investment, declaring that his real estate, though sale of it or part of it might be delayed, should be transmissible as personal estate, and should be considered as converted in equity from the time of his decease, he disposed of the beneficial interest in the whole estate as follows:—

He first made what is admitted to be an absolute gift to his wife of one-third part of the net moneys to arise from the sale, conversion, and getting in of his real and personal estate, and from the rents, interests, and income thereof, until sale and conversion, after payment of his debts, funeral and testamentary expenses, and the expenses of, and incidental to, the execution of the preceding trusts; and directed that in case his wife should predecease him, this one-third should be held by his trustees upon the trusts next to be declared concerning the remaining two-thirds of the

J. C. 1878 ARMYTAGE v. WILKINSON.

same net moneys. Those trusts, so far as it is material to state them, are expressed in the following words:—"I will and direct my said trustees to stand possessed of the securities in or upon which the said two-thirds of the said net moneys shall be invested as aforesaid in trust for my child, if only one, or for all my children, if more than one, in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of a daughter or daughters at that age or marriage, and so that the share or shares, as well original as accruing, of a son or sons dying under the age of twenty-one years, or of a daughter or daughters dying under that age, or without having been married, shall accrue to the other or others of my said children, and if more than one, in equal shares, and be vested as aforesaid, and so that the share or shares, as well original as accruing, of each daughter, shall be received, enjoyed, and disposed of as her separate estate, &c. And I declare that in case any child of mine being a son shall die under the age of twenty-one years leaving issue, then the share, as well original as accruing, which the child so dying would have acquired if he had lived to attain the age of twenty-one years, shall be held by my trustees upon trusts, and subject to provisions in favour of the issue of the child of mine so dying corresponding with the trusts and provisions hereinbefore contained in favour of my child and children, and on the failure of such trusts and provisions shall be disposable as if this declaration had not been inserted."

Then follows the clause which has given rise to the present question:—"But if no object of the trusts hereinbefore declared concerning the said two-third parts of the said net moneys shall acquire an absolutely vested interest, then, if my said wife shall be living at the time of the failure of the said trusts, the said two-third parts of the said net moneys and the investments thereof shall be in trust for her absolutely; but if my said wife shall not then be living, the same shall be in trust for such of the children of my brothers *George Armytage*, *Frederick William Armytage*, *Felix Ferdinand Armytage*, and of my brothers-in-law *George Fairbairn*, *John Charles Galletly*, and *John Prout Hopkins*, as shall be living at such last-mentioned time, in equal shares, the share of each of such children being a male to vest at the age of twenty-

one years, and being a female at that age or marriage." This disposition is followed by a clause for maintenance and advancement in the following terms:—"I declare that my said trustees shall have power to apply the whole or any part of the annual income to which each or any object, being a minor, of the respective trusts and provisions hereinbefore contained shall be entitled, or presumptively entitled, in or towards the maintenance and education or otherwise for the benefit of such object during minority, whether such object being a female shall be married or not, and the unapplied incomes shall be accumulated, and the accumulation thereof shall be liable to be applied in like manner, and, subject to such liability, shall be deemed accretions to the capital whence the same income arose, and that my said trustees shall also have power to apply any part not exceeding one-third of the capital to which each or any male object of the same respective trusts shall be entitled, or presumptively entitled, in or towards the establishment or advancement in the world of such object."

By a codicil, dated the 7th of February, 1870, the testator gave some specific legacies and other further benefits to his wife; declared that during her lifetime the share or shares original and accruing of each child who should live to acquire an absolutely vested interest under the will should not, without her approval, be paid over to such child until he or she should attain twenty-five years; and enlarged in some respects the powers of the trustees.

On the 6th of July, 1876, probate of this will and codicil was granted by the Supreme Court to the Appellants, *Caroline Morel Armytage* and *George Fairbairn;* power being reserved to the other executors named in the will to come in and prove the same. One only, the Appellant *Frederick William Armytage,* has since availed himself of this power.

Probate having been thus granted, the question of the amount of the duty chargeable on the estate arose; and this was determinable by the Colonial Statute intituled *Duties on the Estates of Deceased Persons Statute,* 1870 (Act No. 388), as amended by that intituled, *Duties on Estates Amendment Act,* 1876 (Act No. 523). It will be convenient to speak of them by their shorter designations. It may be necessary hereafter to refer more particularly to some of the provisions of the former of these statutes. At

J. C. 1878 ARMYTAGE v. WILKINSON.

present it is sufficient to state, that the latter affects the question only in so far as it has raised the scale of the duties chargeable under the former; that the effect of the two taken together was to make the duty payable to the Master in Equity of the Supreme Court on account of the Consolidated Revenue; to constitute that duty a debt due from the testator to the Crown, ascertainable at the date of his death, according to the circumstances then existing; to prohibit the issue of the probate from the Master's office without an indorsement by that officer certifying that the duty had been paid; and to fix the rate of duty payable upon the balance of the estate remaining after the deduction of debts, being upwards of £100,000, at 10 per cent., subject to the provisions of the 24th section of Act No. 388, by which the rate of duty payable upon so much of the property as was bequeathed to the widow, or widow and children, or the children of the testator, was reducible to 5 per cent.

In this case, the Master, whilst he only claimed duty at the lower rate upon £47,545 10*s.* 5*d.*, which he took to be the value of what was given to the widow by the will and codicil, required the Appellants to pay duty at the full rate of 10 per cent. upon the sum of £73,925 10*s.* 6½*d.*, being the residue of the final balance, and refused to issue the probate until such duty should be paid.

The Appellants resisted this claim, on the ground that the sum in question having been bequeathed by the testator to his children, or to them and his grandchildren, who, by another Colonial Statute (Act No. 403), have, in this respect, been placed in the same category as children, the duty properly chargeable was only 5 per cent.; and on the 7th of December, 1870, they obtained a rule from the Supreme Court calling upon the Master in Equity to shew cause why a mandamus should not issue, or an order be made, or a rule granted, as the Court should see fit, directing him forthwith to issue probate of the testator's will and codicil upon payment by the executrix and executors of duty upon the said estate at the rate of half the percentage mentioned in the schedule to Act No. 523, in accordance with sect. 24 of Act No. 388.

The Master did not appear, but in his absence, and on the 13th of December, 1876, Mr. Justice *Molesworth* discharged the rule *nisi* upon the ground that upon the true construction of Act 388,

sect. 24, the full duty was payable upon the two-thirds of the residue of the estate which were the subject of the disposition of the testator in favour of his children.

The present appeal is against that decision. It was allowed in the Colony, notwithstanding the opposition of the Master in Equity, appearing by the Crown Solicitor.

Before considering whether Mr. Justice *Molesworth's* construction of the statute is correct, it is necessary to determine the question of jurisdiction, which was argued at the Bar, and is raised by the first of the reasons with which the Respondent's case concludes in these terms: "Because the Court had no jurisdiction in the matter, nor any power to make absolute a rule for a mandamus to the Master."

The cases cited by Mr. Justice *Molesworth*, which will be afterwards referred to, shew that the Supreme Court of the Colony has entertained questions similar to that raised by the present appeal. It is said, however, that this has been done by consent or under protest; and it seems to be agreed that the jurisdiction of the Court to do so as of right has not been settled by any course of decision in the Colony. An appeal (*Bell* v. *The Master in Equity* (1)) in which the question was whether the duty chargeable upon an estate was to be calculated according to the scale of Act No. 388, or that of Act No. 523, which had come into operation since the testator's death, has, however, been heard and determined by this Committee.

That "the Court has no jurisdiction in the matter" is a proposition which, if it means that the Supreme Court has in no circumstances, and by no form of proceeding, power to determine, as between the subject and the Crown, what, upon the true construction of this fiscal statute, is the amount of duty properly chargeable upon an estate, is a proposition which cannot be maintained.

The only provision in Act No. 388, which imports the finality of any proceeding or ruling by the Master, is contained in the 16th section, which declares that his certificate of "the final balance" shall be "final, conclusive, and subject to no appeal," and is limited to that. The "final balance" is the balance or

(1) Law Rep. 2 App. Cas. 560.

J. C. 1878 ARMYTAGE v. WILKINSON.

sum resulting from the statement filed in his office upon which the amount of duty chargeable is to be calculated. There is nothing in the Act to exclude the general jurisdiction of the Court as a Court of Probate or otherwise. By the 10th and 21st sections, it is required to exercise jurisdiction in a particular case. It is certainly conceivable that even upon the special proceeding contemplated by the 10th section, the proper amount of duty chargeable might come to be a question between the parties which would have to be determined by the Court.

Their Lordships however infer, from the argument addressed to them at the Bar, that the objection taken by the Respondent is directed not so much against the jurisdiction of the Court over the subject-matter as against its power to make an order of a mandatory character upon the Master in relation to the duty claimed by him under the statute. And even upon this point they understood the Attorney-General to admit that if the Master is to be regarded as acting in this matter as an officer of Court, the Court, by virtue of its inherent power over its officers, might make a summary order directing him to do what it thought the justice of the case upon the true construction of the statute required. The Attorney-General, however, attributed to the Master two distinct characters; one, that of an officer of Court responsible to the Court for the due performance of his functions in that capacity; the other, that of a revenue officer charged with the collection and payment into the Treasury of the duties imposed by the statute according to its provisions, and responsible as such to the Crown. And he contended that against him in this latter character mandamus would not lie.

Their Lordships are not prepared to admit that the latter proposition is correct, even if the character and position of the Respondent be what the argument of the learned counsel for the Respondent assumes them to be. It is true that in the case cited, *Reg.* v. *The Lords of the Treasury* (1), the Court of Queen's Bench refused to grant a mandamus to compel the application in a particular way of money appropriated by Parliament to the payment of the costs of criminal prosecutions. But the grounds of the decision are thus stated by Mr. Justice *Blackburn*, "The general

(1) Law Rep. 7 Q. B. 387.

principle, not merely applicable to mandamus, but running through all the law, is, that when an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. To take a familiar instance, if a mandamus were applied for against the secretary of a railway company to do something, it would not be granted merely because the railway company, his masters, had an obligation to perform that duty, and it makes no difference that the master, or the principal, or the sovereign, is only suable by petition of right or perhaps not at all." In a subsequent passage he says, "That being so, the question comes to this, whether it can be shewn that in any way a duty is cast upon the Lords of the Treasury towards third persons, not merely a duty to the Queen to advise, but a duty to third persons to issue the minute which it is the object of the mandamus to make them issue." It is clear that if the latter state of things had existed, the learned Judge would have held that a mandamus ought to be granted. But upon full consideration of the particular statute, he came to the conclusion that its provisions amounted to nothing more than this, that Her Majesty, to whom the money was granted in law, was to administer it according to the advice of her responsible advisers, and must do it through the hands of her servants; and that the duty of the Lords of the Treasury was only that of advising Her Majesty in the discharge of the obligation, such as it was, which this Act of Parliament had, so to speak, imposed upon her.

In an earlier case, *Reg.* v. *Price* (1), the same learned Judge said, "When the Common Law or the Legislature has cast on a person the obligation, where certain facts exist, not to form his opinion, or exercise a discretion, but to do a certain thing, then no doubt there is a preliminary inquiry whether those facts exist, and to some extent it is necessary to exercise common sense, and see whether the facts do exist. If the facts exist, we have then the power to issue a peremptory mandamus, ordering the person to do the thing which the law makes it incumbent upon him to do." And applying that principle, the Court issued a mandamus to the commissioners appointed by the Crown for the investigation of corrupt practices in a borough, commanding them to grant a

(1) Law Rep. 6 Q. B. 418.

J. C. 1878

ARMYTAGE v. WILKINSON.

certificate of indemnity to a witness who had been examined before them.

The present case seems to fall still more directly within the principle enunciated by Mr. Justice *Blackburn*. The 12th section of Act No. 388, whilst it enjoins the Respondent to retain the probate until the amount of the duty properly chargeable upon the estate has been paid, imposes upon him, or leaves him subject to, the obligation of issuing that probate to the persons entitled thereto, with the certificate necessary to make it receivable in evidence indorsed upon it, so soon as the statutory lien has been satisfied by the payment of the proper amount of duty. He has no discretion in the matter. When the facts, of which the amount of duty chargeable under the statute is one, have been ascertained —and, if disputed, they are ascertainable by the Court—his duty to the executors becomes absolute, and would seem to be enforceable by mandamus.

It was further argued by Sir James *Stephen* that mandamus will not lie where there is another remedy. But he failed to shew what other remedy existed in this case; nor is it easy to see by what remedy other than a mandatory order of some kind the executors can obtain the delivery to them, in its proper form, of the document essential to their title.

Their Lordships, however, do not deem it necessary to decide that the prerogative writ of mandamus ought to be issued in a case like the present, because they are of opinion that the foundation of the Respondent's objection to the jurisdiction of the Court to entertain the application against him fails, inasmuch as it is based upon a misconception of his true character and functions.

Before the passing of Act No. 388, or of any other Act *in pari materiâ*, the Master in Equity was unquestionably an officer of the Supreme Court, whose especial functions in this matter were to carry out the orders of the Court, sitting as a Court of Probate, by delivering to the parties interested, upon their performance of the obligations and compliance with the formalities prescribed by law, probates or letters of administration, as the case might be. That this was so is shewn by Act No. 10 of the 15 Vict., being "the Act to make provision for the Administration of Justice in the Colony of *Victoria*," and from the 1st and 8th chapters of the Rules

made under the authority of that statute (see *Victoria* Statutes, vol. iii., p. 267). By Act No. 388 the Legislature increased the legal obligations of executors and administrators by superadding that of paying before they received their document of title the duty chargeable on the estate which they were to administer, and added to the obligations and responsibilities of the Master in Equity by imposing upon him the new functions of collecting and accounting for the duties on the estates of deceased persons. But it did not otherwise affect the duty which he owed to executors and administrators, or to the Court. And neither by express words, nor, as their Lordships think, by necessary implication, did it withdraw him from the general control and supervision of the Court to which, as its officer, he was already subject. The 25th section in particular is so far from attributing to him two distinct characters—one as a revenue officer and the other as an officer of Court—that it deals with him as one public officer exercising his original as well as his new functions, and modifies, subject to the special orders of the Court or Judge, the amount of the security which he could only as an officer of Court take from an administrator.

Hence, if, as their Lordships have already endeavoured to shew, the Court has generally jurisdiction, in case of dispute, to determine as between the Master acting on behalf of the Crown and the other parties interested, such a question as has here arisen on the construction of a fiscal statute, there seems to be no reason why it should not exercise that jurisdiction by the machinery of a summary order upon its officer. That form of procedure was adopted, with the sanction of this Committee, in the case of *Bell* v. *The Master in Equity* (1), already referred to; and it seems to be the simplest and the most convenient.

Their Lordships have now to consider whether the decision of Mr. Justice *Molesworth* upon the merits of the application to him is correct.

They must begin by expressing their dissent from the principle which seems to have influenced Mr. Justice *Molesworth* in this and some of the earlier cases, viz., that the provisions of the 24th section, because they establish an exception to the general rule,

(1) Law Rep. 2 App. Cas. 560.

J. C. 1878 ARMYTAGE v. WILKINSON.

are to be construed strictly against those who invoke their benefit. That principle is opposed to the rule expressed by Lord *Ellenborough* in *Warrington* v. *Furbor* (1), and followed and confirmed in *Hobson* v. *Neale* (2). Lord *Ellenborough's* words are:—"I think that when the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception confining the operation of the duty." It is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction need arise. Again, in the case of *Re Hamilton* (3), Mr. Justice *Molesworth* seems to have been influenced in his construction of this statute by the consideration of certain fiscal consequences. He said: "If this system of a man locking up property under a series of limitations, first to his children, and then to more remote descendants, gets any protection, the revenue will be a loser. If, instead of the property passing through several successive bequests from parent to child, and so on, it is limited to children and then to grandchildren, instead of there being two or three devolutions, each subject to duty, and each paying 2½ per cent., the original locker-up would have exempted his estate for several generations from paying more than a single duty. The broad view is this, that it is the obvious policy of the Act to obtain payment at once of all the duty with which the estate may be chargeable, and it does not deal with contingencies which may arise after many years." Upon this it is to be observed, that in *Re Willsmore*, a case which arose subsequently, and was taken by appeal from Mr. Justice *Molesworth* to the full Court (4), the two learned Judges who affirmed Mr. Justice *Molesworth's* decision in that particular case repudiate the construction of the statute which in *Re Hamilton* (3) he would have applied to successive limitations of the same fund in favour of a wife, with remainder to children, with remainder to grandchildren, and say: "In order to bring a case within sect. 24, it appears to us that the whole *corpus* of the estate (or that portion of it in respect of which the exemption from full duty is claimed) must either be divided between the

(1) 8 East, 242.
(2) 17 Beav. 185.
(3) 3 Aust. Jur. p. 95.
(4) 2 Vict. L. R. Insol. & Prob. Cas. 30.

widow and children in certain proportions absolutely, or, if not so divided, the whole interest (or part, as the case may be) must, by means of particular estates and remainders, be so bequeathed that no one but the widow and children are entitled under the will to any part of the *corpus*, an interest in which has been so bequeathed to them."

Their Lordships fully concur in that construction so far as it is in favour of children or grandchildren taking by successive limitations, but that of course leaves untouched the question whether in the case of property bequeathed by a testator to his children, with a gift over on a contingency to remoter relatives or strangers, the children by reason of that gift over are to lose the benefit of the provisions of the 24th section of the statute—a question upon which the weight of Colonial authority seems to be against the Appellant.

Upon this question their Lordships observe that by the 24th section the Legislature has manifested a general intention in favour of the widow and children of a testator. It has *expressed* no intention to tax the children at the higher rate, because the testator in the exercise of his testamentary power may make a gift over in the event of the failure of the trusts and provisions in favour of his children. There seems to be no reason why, as suggested by Mr. Justice *Stephen*, in *Re Willsmore* (1), the value of the respective interests of the children, and of the strangers, if they are capable of appreciation, should not be calculated in the usual way, and the duty levied accordingly.

In the present case it certainly would not be easy to appreciate the value of the possible interest of the class consisting of the testator's nephews and nieces, depending as it does upon a triple contingency, viz., first, that no child or grandchild of the testator being male shall attain the age of twenty-one years, or being a female shall attain that age or be married; secondly, that on this failure of the testator's issue his widow shall be dead; thirdly, at the time of the happening of those two contingencies one at least of the objects of the contingent gift shall be living.

Again, though the statutory lien necessarily ceases on the delivery of the probate, there seems to be no reason why the Legislature should not have provided, if it has not provided, for the

(1) 2 Vict. L. R. Insol. & Prob. Cas. 30.

J. C. 1878 ARMYTAGE v. WILKINSON.

recovery of the additional duty on the happening of the contingency, as a Crown debt *debitum in præsenti solvendum in futuro.* But if no such means of meeting the difficulty as those above suggested exist or can be provided, there still seems to be no reason why the general intention of the Legislature in favour of the children should be defeated by making the consequences of that state of things fall upon them rather than upon the State, unless that particular intention is necessarily to be inferred from the words of the 24th section and the other provisions of the statute. In the view which their Lordships take of the present case, the difficulty does not arise.

The words of the 24th section are: "When the widow of a testator or widow and children of a testator, are the only persons entitled under his will, the duty shall be calculated at one-half only of the percentage mentioned in the schedule; and when other persons are entitled under such will the duty shall be calculated so as to charge only one-half of the percentage mentioned in the schedule upon the property devised or bequeathed to the widow of a testator, or widow and children of a testator, or children of a testator."

In order to decide how far the present case falls within these provisions or either of them, it is material to determine the question, so much argued at the Bar, whether upon the true construction of the testator's will the interests given to the children are vested or contingent.

Their Lordships are of opinion that these interests were at the date of the testator's death vested, though subject in certain events to be divested.

In the present case, the trustees are directed to hold the fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares." So far the gift is absolute. To what extent is it controlled by what follows? The qualification is thus expressed, "and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of a daughter or daughters at that age or marriage." The authorities shew that the word "vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become abso-

lute and indefeasible. Such a construction was put upon the word not only by Vice-Chancellor *Parker*, in the case of *Taylor* v. *Frobisher* (1), which was so much relied upon at the Bar, but also by the Lords Commissioners (including Lord *Cottenham*) in the earlier case of *Berkeley* v. *Swinburne* (2), and by Vice-Chancellor *Page Wood*, in the later case of *Poole* v. *Bott* (3). Here the grounds for such a construction are strengthened by the testator's use of the word "absolutely," which in the case of the limitation in favour of the children precedes the word "vested," but does not precede or qualify that word in the case of the contingent limitation in favour of the nephews and nieces. In other respects, many of the circumstances relied upon in the cases just referred to as evidencing a general intention that the shares should vest in interest at the time of the testator's death, though subject to be divested in the events contemplated, occur also in the will now in question. It speaks, like that construed in *Berkeley* v. *Swinburne* (2), of the "original and accruing share" of any child who may die under twenty-one; it also contains provisions for maintenance and advancement out of "the annual income to which each or any object, being a minor, of the respective trusts and provisions hereinbefore contained shall be entitled or presumptively entitled" (the term "entitled" seems to refer to the children, the term "presumptively entitled" to the remoter objects of the testator's bounty), with a direction that "the unapplied income shall be accumulated, and the accumulation thereof shall be liable to be applied in like manner, and, subject to such liability, shall be deemed accretions to the capital whence the said income arose." This last provision points distinctly to the ascertainment and vesting in interest of the original share of each child from the date of the testator's death. And the whole will seems to their Lordships to afford an inference at least as strong, if not stronger, than that which the Lords Commissioners drew from the will before them in *Berkeley* v. *Swinburne* (4), viz., "that the testator could not have meant that the shares of the sons should not vest in them until they attained twenty-one, or that the shares of the daughters should not vest in them until they attained twenty-one

(1) 5 De G. & Sm. 191.
(2) 16 Sim. 275.
(3) 11 Hare, 33.
(4) 16 Sim. at p. 283.

J. C. 1878 ARMYTAGE v. WILKINSON.

or married. What he did mean was, that until these events happened their shares should not be indefeasible."

If this be so, and the shares of the children were vested in interest, though subject to be divested, it seems clear that at the date of the testator's death the whole beneficial interest in his estate was in his widow and children. They were "the only persons entitled under the will." All the property was "property bequeathed to the widow and children of a testator." It is equally clear that this state of things would continue until the happening of the remote contingency upon which the gift over in favour of the nephews and nieces was to take effect; for up to that time the defeasible character of each child's interest could only affect the shares of the children or grandchildren *inter se*. That the nephews and nieces, who had only a remote and contingent interest, can, in the proper sense of the term, be said to be "persons entitled under the will" is negatived by the construction put by Lord Justice *James* upon the word "entitled" in *Umbers* v. *Jaggard* (1). That "they are not entitled, and may never become entitled," is even more predicable of them than of the person to whom the expression was applied in that case, whose contingent interest was that he was tenant in tail in remainder expectant on failure of the sons of an uncle. Their Lordships are therefore of opinion that, in this case, the property bequeathed in trust for the testator's children is property on which, upon the true construction of the statute, duty was chargeable only at the lower rate.

It is unnecessary in this case to decide that this would equally have been the case had the shares of the children not been vested in interest, and so expressly to overrule the decision of the Supreme Court of *Victoria* in *Re Thomas Willsmore's Estate* (2). The gift in that case being only to "such child or children of the testator as being a son should attain the age of twenty-one years, or being a daughter should attain that age or be married," it is clear that his child (there was but one) had not at the time of the testator's death a vested interest. Their Lordships neither affirm nor disaffirm the correctness of the ruling of the majority of the Court in that case. In this case they will humbly advise Her Majesty to reverse the order of Mr. Justice *Molesworth*, and in lieu

(1) Law Rep. 9 Eq. 200. (2) 2 Vict. L. R. Insol. & Prob. Cas. 30.

thereof to make an order absolute upon the Master in Equity, directing him, upon payment by the Appellants of duty upon the whole of the estate of *Charles Henry Armytage*, deceased, at the rate of half the percentage mentioned in the schedule to the *Act to amend the Duties of Deceased Persons Statute*, 1870, to deliver to them the probate of the will and codicil of the said deceased, with the usual and necessary certificate of the payment of duty indorsed thereon.

Their Lordships think that each party should bear their own costs of the proceedings in the Court of *Victoria*, but that the Appellants must have their costs of this appeal. That was the course followed in *Bell* v. *The Master in Equity* (1).

Solicitors for the Appellants: *Murray, Hutchins, & Co.*
Solicitors for the Respondent: *Freshfields & Williams.*

(1) 2 App. Cas. 560.

[HOUSE OF LORDS.]

H. L. (E.) 1877

THE "SINGER" MACHINE MANUFACTURERS . . . . . } APPELLANTS;

Nov. 16, 20, 21, 22; *Dec.* 13.

AND

WILLIAM NEWTON WILSON . . . . RESPONDENT.

Name—Trade-mark—Form of Decree.

Where the first producer of an article of manufacture has identified with it a particular name, whether his own name or a name which is a word descriptive of the article itself, such name becomes a trade-mark, and cannot be adopted and employed by another person in advertising a similar article.

Such adoption and employment will be restrained by injunction.

S. made a sewing-machine, to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the machines known as the "*S.*" sewing-machines, and which were made in great variety, and with many modifications, but though not protected by patents, were established in public favour under that name. *W.* sold sewing-machines, and advertised, among others, "*S.*" sewing-machines, but used his own trade-mark on the machines, and expressly stated in his advertisements that the machines sold by him were manufactured by himself:—

Held, that this, nevertheless, constituted a wrongful invasion of the property of *S.*, and that *W.* might be restrained by injunction.

Fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark.

S. filed a bill, praying for an injunction against *W.* The Court below made a decree dismissing the bill with costs, prefacing such dismissal with words which declared that the affidavits filed by the Plaintiff, even if uncontradicted and unshaken by cross-examination, would not establish the Plaintiff's title to relief; but ordered such affidavits to be considered as read, so that the Plaintiff upon any appeal might not be prejudiced by the omission thereof; and that the Defendant had applied to the Court for liberty to adduce evidence in answer, but that the Court being of opinion that it was not necessary to consider such application, &c.:

Held, that this decree was irregular, as it appeared to express an opinion upon affidavits which did not seem to have been read, but were only to be considered as read, and the Court had not heard the evidence tendered by the Defendant.

THE HOUSE, after declaring its judgment upon such parts of the case as were not in dispute as to the facts, directed the case to be remitted to the Court below, considering that there had been a *primâ facie* case established by the Plaintiffs so as to require an answer by way of evidence on the part of the Defendant.

Per LORD BLACKBURN:—*Quære* whether the same reasoning and the

same rules are applicable to a trade-mark and to a name used in an advertisement.

Per LORD BLACKBURN :—*Quære*, whether there is a property in a name, and whether, in a case like this, it is necessary to prove fraud in the person who without warrant adopts it.

THIS was an appeal against an order of the Court of Appeal, affirming a decree made by the Master of the Rolls on the 14th of December, 1875, in a suit instituted by the Appellants to restrain the Respondent from selling the "*Singer*" sewing-machines (1). The facts are so fully stated and commented on in the judgments, that it is only necessary here to give a brief outline of them.

In 1850 Mr. *I. M. Singer*, of *New Jersey*, began the business now carried on by the Appellants, and manufactured sewing-machines of various kinds and different constructions. From time to time he took partners into the concern, and finally they obtained from the legislatures of *New York* and *New Jersey* Acts of incorporation. The machines sold by the Appellants were not patented in this country, and the Appellants professed that they, from time to time, introduced modifications into the making of these machines, but they claimed to have the exclusive right to apply, on all occasions, the name "*Singer*" to them, which name they insisted had become their trade-mark, or trade name and designation.

The Respondent was a manufacturer and vendor of sewing-machines, carrying on business in *London* and *Dublin*, and in the price lists used in his business described, among other articles which he sold, the "*Singer* Sewing Machine;" but he put upon each machine of that name a plate mark, which described it as made by himself. He insisted that all the machines sold by the Appellants had a certain characteristic combination of parts, and did not, in the understanding of the trade or public, mean a sewing-machine of a particular construction made by the Appellants, who, he alleged, also made and sold other machines of a totally different construction.

It appeared that the Appellants had affixed to their machines a device consisting of a shuttle and needles crossed with a line of cotton in the form of the letter S., and that this device was placed in the centre of an ellipse. Under the device were the words

(1) 2 Ch. D. 434.

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

"trade-mark." Just inside the ellipse, at the top, were the words and letters "The *Singer M. F. G. Co.—N. Y.*" All their machines were also marked in large letters "*The Singer Manufacturing Co.*" In their price lists the Appellants printed a copy of the above device, with the statement, "No machine sold as the '*Singer*' is genuine without this trade-mark fixed to the arm."

The Respondent did not put the word "*Singer*" on his machines. Each machine sold by him had attached to it a brass plate, bearing the device of St. George and the Dragon, surrounded by the words "*Newton Wilson & Co.*, Manufacturers, 144, *High Holborn.*" He always described them, and directed his sale agents to describe them, as "Our machines," and sold several sorts of machines, some of which had been the subject of patents, now expired, and had borne the names of "*Wheeler & Wilson,*" "*Grover & Baker,*" "*Howe,*" and "*Singer,*" but all were stated to be manufactured by himself. In his defence he denied any invasion of the rights of the Appellants, and insisted on his right thus to conduct his business.

Evidence was given for the Plaintiffs in the cause (the Appellants), and evidence was prepared and tendered on the part of the Defendant (the Respondent), but the Master of the Rolls thought it unnecessary to receive the Defendant's evidence, and on the 14th of December, 1875, made a decree in favour of the Defendant. The decree recited that, "the Court being of opinion that, as regards so much of the evidence tendered by the Plaintiffs as is admissible, it would not, if uncontradicted, or unshaken by cross-examination, establish the Plaintiffs' case to any relief against the Defendant," and went on thus: "doth order that the affidavits filed on behalf of the Plaintiffs, and enumerated in the first schedule, be considered as read, in order that the Plaintiffs upon any appeal may not be prejudiced by the omission thereof. And the Defendant having applied to this Court for liberty to adduce *vivâ voce* evidence in answer to certain parts of the aforesaid evidence tendered by the Plaintiffs, and this Court being of opinion that it was not necessary to consider such application, this Court doth order that the Plaintiffs' bill do stand dismissed with costs."

On appeal the Lords Justices, on the 25th of March, 1876,

ordered the decree of the 14th of December, 1875, to be affirmed with costs.

This appeal was then brought.

Mr. *Aston*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *Hemming*, Q.C., and Mr. *Rigby*, were with them) for the Appellants:—

There has been in this case the wrongful appropriation of a name, and a name may become a trade denomination, and as such the particular property of a person who first employed it to designate an article of manufacture. *Millington* v. *Fox* (1) clearly stated that as the ground on which in such cases protection is granted. If so, the person who first made the article and first appropriated the name is entitled to be protected against its appropriation by any one else. To the name of "*Singer*" as descriptive of a sewing-machine the Appellants had an exclusive right. What had been done in *Wotherspoon* v. *Currie* (2) had been repeated here. The name "The *Singer*" sewing-machine designated a sewing-machine with which the public had become familiar, and which was favourably known; and, without inquiring by whom a "*Singer* sewing-machine" was made, the public believed that the sewing-machine which was sold under that name, was the machine which was the Appellants' manufacture, and which it was desirable to purchase. The representation, therefore, that it was made by *Wilson*, even if noticed by the purchaser, would leave him in the full belief that it was made in the form and with the peculiarities of the particular machine of which he was in search. Now that was the very deception on the purchaser against which it was the object of the law to protect him. And that constituted, too, the injury of which the proper owner of the name had the right to complain: *Southern* v. *How* (3); *The Singer Company* v. *Kimball* (4); *Rodgers* v. *Nowill* (5); *Burgess* v. *Burgess* (6); *Croft* v. *Day* (7); *Maxwell* v. *Hogg* (8); *Clark* v. *Freeman* (9); *Ains-*

(1) 3 My. & Cr. 338.
(2) Law Rep. 5 H. L. 508.
(3) Poph. 146.
(4) 11 Court of Ses. Cas. 3rd Series, 267.
(5) 5 C. B. 109; 17 L. J. (C.P.) 52.
(6) 3 D. M. & G 896.
(7) 7 Beav. 84.
(8) Law Rep. 2 Ch. Ap. 307.
(9) 11 Beav. 112.

H. L. (E.) 1877

"SINGER" MACHINE MANUFACTURERS v. WILSON.

worth v. *Walmsley* (1); *Franks* v. *Weaver* (2); *Seixo* v. *Provezende* (3).

Mr. *Bidder*, Q.C., and Mr. *Lawson*, for the Respondent:—

The term "*Singer*" was a mere name, and there was no exclusive property in it. It had no such meaning in the public mind as was supposed on the other side. It was not like the name of a particular wine, such as Champagne or Hock of a particular sort, which could only be produced from one district, which district was known to belong to one individual proprietor. The Respondent had done nothing which he was not entitled to do; and the Appellants' own evidence by no means made out a case to shew that the word "*Singer*" was deemed to describe a machine of a peculiar kind made in a special manner and having particular advantages. The use of the name of "*Singer*" was no more than would be the use of the name of "*Hansom*" to a cabriolet, or "*Brougham*" to a one-horse carriage (4); it was a name that could be used by any one. The Appellants themselves admitted that they did not manufacture their machines in one particular manner and according to one type, and without alteration. So that their own machines would vary from each other at different intervals of time. The Appellants sometimes called themselves patentees and sometimes sole proprietors; but they did not shew that, in fact, either of these descriptions belonged to them, and were deemed by the public to belong to them, so as to confer on them any peculiar and exclusive right. They were, therefore, not protected like ordinary patentees, or like persons who made and sold an article made after a fixed pattern, and known by an established trade-mark: *Canham* v. *Jones* (5). Here the Respondent, though he spoke of selling *Singer* machines, carefully announced to the public that the machines which he made were made by himself, and, more than that, he claimed that

(1) Law Rep. 1 Eq. 518.
(2) 10 Beav. 297.
(3) Law Rep. 1 Ch. Ap. 192.
(4) "*Hansom*" was the name of the patentee of a peculiarly built cabriolet; "*Brougham*" was the name, not of a patentee or a manufacturer, but of a very distinguished person, whose use of a close carriage, drawn by one horse, first made that sort of vehicle fashionable, and it was named from him.
(5) 2 V. & B. 218.

those of his manufacture were of a sort superior to any others. His use of the word was entirely without fraud, and unless in a case of fraud an injunction was not maintainable. Then, again, there was a great difference between the marks stamped on his machines and those which came from the Appellants' manufactory. The difference was so great that it was impossible to conceive that any one could be misled. No trade-mark of the Plaintiffs was used on the Defendant's machines. There was, therefore, no pretence for setting up a claim for an injunction on the ground that there was an imitation of a manufactured article so contrived as to mislead the public. The cases already cited were commented on, and *Ford* v. *Foster* (1); *James* v. *James* (2); *Edelsten* v. *Vick* (3); *Wheeler and Wilson Company* v. *Shakespear* (4); *The Leather Cloth Company* v. *The American Leather Cloth Company* (5); *Raggett* v. *Findlater* (6); *Cheavin* v. *Walker* (7).

Mr. *Aston* replied.

1877
Dec. 13.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case a suit was instituted in the Court of Chancery by the Appellants, to restrain the use, by the Respondent, of the name of "*Singer*" as a designation of or in connection with sewing-machines, and a decree was made by the Master of the Rolls on the 14th of December, 1875, dismissing the Appellants' bill with costs. From that decree an appeal was brought before the Court of Appeal in Chancery, and on the 25th of March, 1876, the Lords Justices (Lord Justice *James*, Lord Justice *Mellish*, and Lord Justice *Baggallay*) dismissed the appeal with costs. In neither Court were the counsel for the Respondent heard. The propriety of the dismissal of the bill is the question in the present appeal.

My Lords, I must in the first place direct your Lordships' attention to the very peculiar form of the decree made by the Master of the Rolls. It professes to be made upon hearing counsel for the Plaintiffs, who tendered in evidence the affidavits filed on

(1) Law Rep. 7 Ch. Ap. 611.
(2) Law Rep. 13 Eq. 421.
(3) 11 Hare, 78.
(4) 39 L. J. (Ch.) 36.
(5) 11 H. L. C. 523.
(6) Law Rep. 17 Eq. 29.
(7) 5 Ch. D. 850.

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

behalf of the Plaintiffs enumerated in the first schedule, and the exhibits in those affidavits mentioned. The Court then dismisses the bill with costs, prefacing the dismissal with these words, "This Court, being of opinion that as regards so much of the evidence tendered by the Plaintiffs as is admissible, it would not, if uncontradicted or unshaken by cross-examination, establish the Plaintiffs' title to any relief against the Defendant, doth order that the said affidavits filed on behalf of the Plaintiffs and enumerated in the first schedule, and the exhibits, be considered as read in order that the Plaintiffs upon any appeal may not be prejudiced by the omission thereof; and the Defendant having applied to this Court for liberty to adduce *vivâ voce* evidence in reply to certain parts of the aforesaid evidence tendered by the Plaintiffs, and this Court being of opinion that it was not necessary to consider such application, &c." The decree farther orders that in the taxation of costs the costs of the affidavits filed on behalf of the Defendant enumerated in the second schedule, and the exhibits therein referred to, are to be included.

The affidavits filed by the Defendant were not read, and are not before your Lordships, although a list of them is given in the second schedule to the decree. Your Lordships were farther informed at the Bar that it had been proposed on both sides to cross-examine some of the witnesses who had made affidavits, but this also, from the course taken by the Court, was not done.

My Lords, I have never before seen a decree in this form; and it appears to me to be a form which is calculated to lead, and in this case has led, to considerable inconvenience. It is difficult to know what is meant by the statement that the affidavits of the Plaintiffs were to be considered as read, when the Court had, in the previous sentence, expressed an opinion upon the effect of the affidavits, an opinion which could not be expressed unless the affidavits had been read. But, passing from this, I must farther remark that, although I have no doubt the course taken by the Court was taken in order to save time and also expense, and although the course taken might be one that would save both time and expense if the first hearing was to be final, it is sufficiently obvious that where there may be a re-hearing, and an appeal to your Lordships' House, the course taken is one which,

in place of being a real saving, may lead to a considerable loss of time and increase of expense. It is impossible to say in any case whether the view taken by the Court of final appeal will be the same as that taken by the Court of first instance, and, if it is not the same, it may lead to the case going back again in order to have the farther evidence, which the parties were ready to have produced in the first instance, supplied.

I must now direct your Lordships' attention to the issue which is raised between the Appellants and the Respondent on the pleadings. The Appellants state, in substance, that they are a manufacturing company trading in *America* and *Great Britain*, having the name of, and trading in succession to, a person of the name of *Singer*, who established, both in this country and in the *United States*, a large business in the manufacture and sale of sewing-machines; that, from the time the business was first started, these sewing-machines were advertised and sold as *Singer* or *Singer's* machines; that their workmanship obtained for them a very wide reputation; that great varieties of sewing-machines, with many modifications in their mechanical details and many improvements of different kinds, have been made by *Singer* and by the *Singer* Company, but that no one of them has been made according to any patent, nor is there any patent completely descriptive of any of them, although *Singer* and the company have held patents for minor details and accessories; that the mechanical construction of the machines has been from time to time varied in many ways, so that the designation "*Singer*" does not import, and is not generally understood to import, any specific principle of construction or mechanical arrangement of working parts, or any single type of machine, but simply that the machines so designated are of the Appellants' manufacture, constructed in one of the several forms which they from time to time adopt; that they have spent £60,000 and upwards in advertising their machines as *Singer* or *Singer's* machines, and they have become known as such throughout the world, and the name has become and is a trade-mark of the Plaintiffs. They then state that the Defendant has been making and selling to the public sewing-machines, and on his price-lists has described them as, and has given to his salesmen and travellers directions to describe and sell them as *Singer* or

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

Singer's machines, and that this course of business is calculated to mislead, and has misled, purchasers into the belief that the machines offered for sale by the Defendant are machines of the Plaintiff's manufacture.

I may stop here to observe that if these allegations are true, if the term a *Singer* or *Singer's* machine denotes to the mind of the public, or of those likely to purchase such articles, not a particular type, or shape, or arrangement of parts of a machine, but a machine the manufacture of a particular person or firm; and if the Defendant, whose name is not *Singer*, represents his machines as being *Singer* or *Singer's* machines, there is at least a case which calls upon the Defendant to shew some reason which would justify him in thus making use of a name which is not his own, but which is the name, and is known to indicate the manufacture, of the Plaintiffs.

The Respondent appears to have felt that it was incumbent upon him to justify his use of the name, and he gives in his answer a statement as to which, if the facts alleged had been established by evidence in the case, the justification might well have been held to be sufficient. He states that there are two classes of sewing machines known to the trade and public by the name of "*Singer*" machines. One of these is a manufacturing machine, adapted mainly for use in factories, the other a family machine, adapted for family use. The manufacturing class of *Singer* machine was described in all its details in the specification of *Hughes*, dated 1852, and was, as the Defendant believes, invented by *Singer*, and patented by him in *America*. He states that it was known that the machine was invented by *Singer*, and has always been known as the "*Singer* machine"; that in 1853 there was added to this machine an arrangement for controlling the slack thread, comprised in a patent of *Newton*, which arrangement was also the invention of *Singer;* that the family class of the *Singer* machine has always comprised and now comprises the same mode of actuating the needle and of controlling the slack thread as is comprised in the patents of *Hughes* and *Newton*, and has in addition what is called a "wedge feed," described in a patent of 1861, granted to *Singer;* that the family class of *Singer's* machine is driven by mitre gearing. He farther states, that the term

"*Singer*" machine is perfectly well understood by the trade and the public to mean a sewing machine of one of the two classes aforesaid, and that the term "*Singer*" or "*Singer's* machines," does not, in the estimation of the trade or the public, designate a machine as having been made by the Plaintiffs or their predecessors in the said business, but is merely descriptive of any machine by whomsoever made, which is one of the classes aforesaid. He states farther, that he manufactures several classes and varieties of sewing machines, and, amongst other machines, machines of the classes described by him as the "*Singer Manufacturing Machine*," and the "*Singer Family Machine*," that he has on his price list described such machines, and has given to his salesmen and travellers directions to describe and sell them as "our *Singer* machines," "meaning those made by my said firm, but not *Singer's* machines." That every machine sold by him, whether a *Singer* machine or otherwise, has attached to it in a conspicuous place a plate bearing his trade-mark, that is the device of St. George and the Dragon, with the words "*Newton Wilson & Co.*, manufacturers, 144, *High Holborn*." He admits that he intends to persist in describing such machines as the "*Singer*;" but not as "*Singer's* machines"; and he submits to the judgment of the Court, that, under the circumstances mentioned, he is perfectly justified in so doing.

It is perfectly clear that the defence set up in this answer, and the issue tendered by the Defendant, is that the term "*Singer*," as applied to a sewing-machine, has, in the language of the country and the nomenclature of the trade, come to describe a machine or two machines of a particular structure and formation, without any reference to the manufacture, or to the quality of manufacture, just as the terms "Brougham" and "a Hansom" cab have come to mean carriages of a particular shape by whomsoever made; and the object of the Defendant has been to bring the case within the authority of some well-known cases decided in the Court of Chancery, in which it has been held—but always upon the evidence in each case—that a proper name applied to a patented or other article may come to be the name of the article, and not a mark or sign indicating the manufacturer.

How, then, does the evidence stand upon the issue—the only

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

issue—thus raised by the Defendant? The affidavits on behalf of the Plaintiffs are very numerous; they come from all parts of *England, Ireland,* and *Scotland;* they come from persons dealing in, and persons using, sewing-machines. Some of them come from the heads of large manufactories, where great numbers of machines are in use. They cannot have any motive that I can discover to bias their evidence, for there is no question here of a patent to be supported or to be overthrown. I will take as a sample of those affidavits the affidavit of *Edward Hunt,* of the firm of *W. & C. Hunt, White Lion Street, Norton Folgate,* general house furnishers and sewing-machine dealers, who has been in the sewing-machine trade for upwards of ten years, and states that he is well acquainted with the leading kinds of sewing-machines used in this country. The 2nd, 3rd, 4th, 5th, and 6th paragraphs of his affidavit are as follows:—"I am well acquainted with the various kinds of sewing-machines from time to mine made by the *Singer Manufacturing Company* and their predecessors in business, especially the following varieties: the letter A. Family, the New Family, the New No. 1 Drop Feed, the Medium, the No. 2 Cloth Machine, the No. 2 Imperial, the No. 2 Combination Presser, and the No. 3 Machine. Each of these machines I consider, and from experience I say the trade and public consider, to be distinct kinds of sewing-machines. As an experienced dealer in sewing-machines, I say that the machines known in the market as '*Singer*' or '*Singer's*' machines are machines made by the *Singer Manufacturing Company* or their predecessors, and no others. The name '*Singer*' has never been associated, in my mind, with, nor has it ever been looked upon by the public as, indicating a machine made in accordance with *Edward Joseph Hughes*' patent, 1852, No. 14,256, nor with any other patent, but simply as the name of the manufacturer. I have always traded upon the name '*Singer*' as the name of the manufacturers. There is not any particular machine known to the trade as a '*Singer*' machine, nor is it true there are two classes (in sense of two styles of construction) of sewing-machines which are known to the trade and public by the name of '*Singer*' machine, or that one of such machines is a manufacturing machine adapted mainly for use in factories, and the other a family machine adapted for family use,

although it is true that one of the many varieties of machines made by the Plaintiffs is called by them in their trade circular 'The New Family Machine,' and that others are called by them in their said circular 'manufacturing machines.' It is not true that the term '*Singer*' machine is perfectly well understood by the trade and public to mean a sewing-machine of one of the two classes, meaning one of the two styles of construction, but I say that the term '*Singer*' or '*Singer's*' does, in the estimation of the trade and public, designate a machine as having been made by the Plaintiffs or their predecessors in business; nor has the name '*Singer*' or '*Singer's*' any application to a machine of the classes aforesaid made by any one other than the Plaintiffs or their predecessors in business. It is not true that the only machines known to the trade and public as '*Singer*' machines are the Family, the Medium, and the No. 2 Cloth Machine. The machine now sold by the Plaintiffs as the Family Machine is not at all like the machine which was for many years sold by the said firm of *I. M. Singer & Co.*, and afterwards by Plaintiffs, in large quantities as the letter A. Family Machine, long before the present family machine was introduced. The machine designated the '*Singer*' medium machine is not a family machine, but is, and always has been, advertised by the Plaintiffs and sold by them as a manufacturing machine. All machines which to my knowledge have been manufactured and sold by Plaintiffs and their predecessors in the said business have always been advertised and sold by them as '*Singer*' or '*Singer's*' machines, and have been so known by the trade and by the public. I could not supply an order given for a '*Singer*' machine. If I received such an order I should understand that a machine manufactured by Plaintiffs was wanted, but should require to know what kind of machine was desired. It is not the fact that the trade and public rely upon Plaintiffs' trade-plate, and not upon the name '*Singer,*' as an indication that machines offered as '*Singer*' machines are of the Plaintiffs' manufacture. Plaintiffs and their predecessors in the said business had obtained a large reputation in this country as sewing-machine manufacturers long before Plaintiffs began to use their trade-mark plate. From my experience as a dealer in sewing-machines, I say that the public seldom notice the said trade-mark plate, and especially

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

is this the case with the poorer class of people to whom the Plaintiffs sell large quantities (*sic*) of machines. The Plaintiffs' machines are known amongst the said class as being reliable machines, and they will readily buy machines which are offered to them as '*Singer*' or '*Singer's*' machines; and it is within my personal experience that amongst this class of the public the Plaintiffs reputation as sewing-machine manufacturers has recently been very seriously injured by inferior imitation machines being sold to them as '*Singer's.*'"

Similar statements are made by more than a score of other witnesses, and their statements are by the decree to be assumed for this purpose to be uncontradicted and unshaken by cross-examination. Some attempt was, indeed, made by the Respondent to shew in some of the advertisements of the Plaintiffs, and in some of the specifications of patents taken out by or for them, the use of the term "*Singer* machine" or "*Singer* system," in a wider sense; but I cannot look upon any of the expressions so used by the Plaintiffs whilst speaking of their own machines as doing away to any serious extent with the effect of the evidence to which I have referred. If, therefore, I were obliged to decide this case upon the issue thus raised, and as it seems to me properly raised, by the pleadings, and upon the whole of the evidence now before your Lordships upon that issue, I should certainly feel it impossible to say that the Respondent had established the issue upon which he had placed his case.

Your Lordships will, however, ask, was it upon this issue that the case appeared to the learned Judges in the Court below to turn? and I feel some difficulty in answering that question. If I rightly understand their judgments they appear to decide that it was unnecessary to consider or to try this issue, and that there were difficulties in the case of the Plaintiffs that were fatal to it, even independently of this issue. I will advert shortly to what I understand to be the difficulties supposed to exist in the Plaintiffs' case.

It is said by some of the learned Judges, and the argument was much pressed at your Lordships' Bar, that there was here no trade-mark of the Plaintiffs used *upon* the machines sold by the Defendant. It was said that the Respondent had a specific trade-mark

of his own upon his machines—the figure of St. George and the Dragon, and that he also placed on all his machines an oval brass ticket, stating that the firm of the Defendant were the manufacturers. It was then said that what the Defendant did, and what was complained of by the Plaintiffs, was done by way of advertisement or statement or representation "in gross," if I may use the expression, and not attached to the machine.

15 Ch D 399

My Lords, I am unable to see that this makes any difference in point of principle. It may well be that if an imitated trade-mark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by *A. B.* (if that is the legitimate effect of the advertisements, which is a separate question) must, in my opinion, be as imperious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves.

It was then said—and this was much relied on both at your Lordships' Bar and in the Court below—that when the advertisements in this case came to be spelt out and read with care, there was in them no misrepresentation of fact, no representation that the machines *were* by the Plaintiffs; but, on the contrary, a statement that they were made by the Defendant; and it was said that any person capable of reading and capable of understanding would see that this was the true effect of the advertisements.

In order to express my opinion upon this argument, I will refer to one only of the advertisements, the Defendant's list of prices. I prefer to take this rather than the evidence of what is alleged to have been said in shops by salesmen and others, both because words spoken are less likely to be accurately repeated, and also because, as the Defendant says he instructs his salesman to state what is stated in the advertisements, it is fairer to the Defendant to look at the advertisements themselves. Now this advertisement is and professes to be a list of prices, and it is in a tabulated form, the catch name, the name to catch the eye—the well-known and obviously familiar name of the different kinds of machines—being

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

stated in inverted commas, and the price carried out in the margin. Any person looking at the table and being familiar with the names of the machines would at once catch with his eye the name of the machine he was in search of, and find a statement of its price without anything more at that part of the table. If he had been told by some one that a *Singer* machine, or a *Singer* family machine, was the most advantageous one to buy, his informant having so told him from his own experience of the merit of machines made by the Plaintiffs, he would recognise at once in the advertisement the term "*Singer*" machine, and would very possibly conclude that he had found the machine of which he was in search. It is quite true that in another part of the list there is a sentence introduced before the enumeration of machines of a different name and character, namely, the *Wheeler & Wilson* machines, to this effect: "Treadle-machines for family manufacturing use on the various well-known American systems, and manufactured by us under their expired patents, but in some cases with patented improvements of our own, and with a finish and perfection that is unapproachable, as follows:" Then comes an enumeration of the *Wheeler & Wilson* machines, and of the *Grover & Baker* machines, and then of the *Singer* family machine and other *Singer* machines.

It must be borne in mind that we have to consider the case not merely of experts in the history and peculiarities of sewing-machines, but the case of common workmen and workwomen having very few and very limited ideas, and a very imperfect knowledge upon the subject of such machines. The hypothesis is, that the evidence establishes that in the trade, machines made by the Plaintiffs have acquired a high reputation, and that the trade looks upon the term "*Singer*" as indicating machines entitled, by reason of their origin, to that reputation. It is sufficient to say that I think it highly possible that many persons might read the term "*Singer* Family Machine," without looking at the sentence to which I have referred, occurring in a different part of the advertisement, and I think it also highly possible that even if such persons were to read that sentence, they might not have sufficient knowledge of who the Plaintiffs were, or how and where they manufactured, to see that the words in that sentence were suf-

ficient to shew that the *Singer* machine, mentioned in the advertisement, was not the kind of machine of which they were in search.

The last point, much pressed upon your Lordships, was that there was no averment in the bill and no proof that what was done by the Defendant was done fraudulently or with an intention to deceive, and it was said that fraud is the essence of the case that must be proved for the protection of a trade-mark.

My Lords, that there have been many cases in which a trade-mark has been used, not merely improperly but fraudulently, and that this fraudulent use has often been adverted to and made the ground of decision I do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark. The argument that fraud must be proved assumes that the trade-mark of the Plaintiffs has been adopted and used by the Defendant, but contends that this use of it is to continue without restraint, even after the improper use has been pointed out, merely because, in the first instance, it took place ignorantly or inadvertently. This argument appears to me to be founded on a misapprehension. A man may take the trade-mark of another ignorantly, not knowing it was the trade-mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it knowing it is the trade-mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the Plaintiff is just the same. The action of the Court must depend upon the right of the Plaintiff, and the injury done to that right. What the motive of the Defendant may be, the Court has very imperfect means of knowing. If he was ignorant of the Plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them.

I have never known any serious doubt entertained on this subject since the case of *Millington* v. *Fox* (1), and I may refer to the

(1) 3 My. & Cr. 338.

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

observations of Lord *Hatherley*, when Vice-Chancellor, in the case of *Welch* v. *Knott* (1): "That the Defendant would not be entitled to use the Plaintiff's bottles in such a manner as in *fact* to mislead the public, although there might be no intention on his part to mislead, is clear." In *Millington* v. *Fox* (2), Lord *Cottenham* felt satisfied that in using the Plaintiffs' trade-marks the Defendants had no intention to mislead the public; yet inasmuch as the public were in fact misled, he held that the Plaintiffs were entitled to a perpetual injunction. It was not sufficient for the Defendants to say that they used the marks in ignorance of their being the Plaintiffs' trade-marks. How far that doctrine is capable of being reconciled with cases at law in which the *scienter* has been held to be essential in order to enable the Plaintiff to recover (that is, to recover damages) it is not material to consider. In this Court the rule is clear, as laid down in *Millington* v. *Fox* (2).

In the present case the question must, as it seems to me, be: Are the advertisements of the Defendant, having regard to the evidence in the case, calculated to mislead an unwary purchaser of the machines? And if that question had to be answered upon the materials before your Lordships, I certainly should feel myself unable to say that the Plaintiffs had not made out a *primâ facie* case. My Lords, in this state of things I regret to have to propose a course which must lead to farther litigation: but there is no help for it. The Defendant would not be content, and naturally would not be content, to have the case decided against him without the opportunity of producing the evidence which at the Rolls he was ready to produce; and anything that I have said must be understood as applying to the case in its present condition as to evidence, and not to what may be its condition when and if farther evidence is adduced. All that your Lordships can do, and what I propose that you should do, is to reverse the decree of the Master of the Rolls, but to declare that this is to be without prejudice to any question in the case; and to remit the case to the Chancery Division, with liberty to the Defendant to make again such application for leave to adduce *vivâ voce* evidence in reply to the evidence of the Plaintiffs as he may be advised, and with liberty to the Plaintiffs and Defendant to make such applica-

(1) 4 K. & J. 747. (2) 3 My. & Cr. 338.

tion as to cross-examination of the witnesses or any of them as they may be advised; and direct the Court to dispose of the case upon the whole of the evidence; and order any costs which may have been paid by the Plaintiffs to the Defendant to be repaid, and order the costs of the suit *ab initio*, including the costs of this appeal, to be in the discretion of the Court upon the farther hearing of the case. I move your Lordships accordingly.

LORD O'HAGAN:—

My Lords, I concur, but with reluctance and regret, in the proposal that has been made by the Lord Chancellor. The proceedings in this matter have already been expensive and protracted; and it would have been in every way desirable that your Lordships should have found yourselves in a position to terminate them without farther litigation. But in the view which we are all, I believe, disposed to adopt, this is unfortunately impossible. The interests at stake are important, the questions in controversy are difficult, and before we finally decide, we should, in my opinion, have before us materials for judgment which are accessible, but have not been brought under the notice of the House.

The substantial issue between the parties is put very clearly upon the pleadings. The Plaintiffs say that the word "*Singer*" does not import, and is not generally understood to import, any specific principle of construction or mechanical arrangement of working parts, or any single type of machine, but simply that the instruments so designated are of the Plaintiffs' manufacture; and then they say that the course of business of the Defendant has been calculated to mislead purchasers into the belief that the machines offered by him for sale are of the Plaintiffs' manufacture. On the other hand, the Defendant avers that the word "*Singer*" has been for many years past, and is now, perfectly well understood by the trade and the public to mean a sewing machine of a particular construction, and does not, in the estimation of the trade or the public, designate a machine as having been made by the Plaintiffs, but describes any machine, by whomsoever made, which has that construction, and that there is no other term by which such a machine can properly be described; and they deny that they have done anything calculated to mislead the public.

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

Upon the issue so presented a great mass of evidence was offered on both sides; and we have before us the Plaintiffs' portion of it, but not that of the Defendant, the Master of the Rolls and the Lords Justices having held that the Plaintiffs have made no case, even though all the statements of all their witnesses should be accepted as true and accurate in all respects.

It would be an idle waste of time to repeat any part of the full statement of fact and testimony that has already been given to your Lordships; but taking that statement as entirely accurate, I confess myself unable to concur with the peremptory rejection of the Plaintiffs' unanswered claim. For myself, I deem it right, in the present position of the cause, and in view of the additional light which may be hereafter cast upon it, to avoid the expression of any positive opinion as to the ultimate determination at which the House ought to arrive. But it does appear to me that the Plaintiffs have given material evidence in support of their interpretation of the word "*Singer*," and of their allegation that it has been used by the Defendant in a way calculated to mislead. If the Defendant can offer valid proofs on the other side in support of his averment as to the meaning of the word and his own use of it, he would appear to have a sufficient answer to that evidence; but having regard to the numerous statements of competent and apparently trustworthy witnesses, some answer to it seems to me to have been required. I do not wish at present to say more than this, or to state the reasons which led me, on a careful, but necessarily as it stands, imperfect consideration of the case, to conclusions which may be altered or modified when it may come hereafter in its entirety before your Lordships.

Several questions arose in the course of the argument as to trade-marks, and trade names, and other matters, and with these also I think it better not to deal prematurely; but on two points of principle, which no addition to the evidence can materially affect, I would venture to say a word.

I think we should be cautious in holding that, although a person of intelligence and observant habits might, in a case like this, by exercising reasonable vigilance, escape misleading, there should be no restricting interference to prevent others from being misled. It is a question of degree—of more or less; there can be no rigid

rule, and the special facts must be considered in every instance. There are multitudes who are ignorant and unwary, and they should be regarded in considering the interest of traders who may be injured by their mistakes. If one man will use a name the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs. I do not say that the mere possibility of deception should suffice to make the appropriation improper, but the chance of misleading should be jealously estimated with a view to this consideration, even though ordinary attention might have been enough to protect from mistake.

On the other hand, I am not, at present, prepared to hold, with the Appellants, that the mere use, by one manufacturer, of a trade name which has been appropriated by another to designate his own manufacture, has in all cases a tendency to deceive, and must necessarily be held to have been used for the purpose of deception, without taking into account the manner of the use and the circumstances connected with it. There may be a presumption against the propriety of the use, but as it may possibly be justified by effectual guards against the deception, I think that, in every case, that manner and those circumstances should be considered, when we are asked to forbid it, especially when, as here, it is alleged, and proof of the allegation is offered, that there is no other term by which the machine it is employed to designate can properly be described.

The case of *Wotherspoon* v. *Currie* (1), relied on in the Appellants' case, does not appear to me to sustain their contention. In that case there were many elements, which do not exist in this, suggestive of evil contrivance and fraudulent design, and the judgment did not proceed upon the single consideration that a trade name, appropriated by one manufacturer, had been used by another.

The second point of principle to which I think it proper to allude, regards the argument that fraud is the essential foundation of jurisdiction in such a case as this, and that, as there is a want of

(1) Law Rep. 5 H. L. 508.

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

allegation or proof of any, the Plaintiffs must necessarily fail. If this were so, there would be no need of additional inquiry, and we should at once affirm the judgments of the Courts below. But I concur with the Lord Chancellor that it is not so. Undoubtedly there are *dicta* which would seem to sustain the proposition, but they must be taken in connection with the particular facts of the cases in which they occur, and I do not think it will be found that there is, anywhere, an authoritative decision which supports it. Thus, in *Wotherspoon* v. *Currie* (1), as I have said, there was ample evidence, *dehors* the mere use of the name, to prove that what was done was done *malo animo*. Here, so far as I understand the facts, there is no such evidence, and no reason whatever for the imputation of fraud. But if a man has acquired legitimately a right to the property in an exclusive use of a name it is of small account to him, should it be invaded, whether the invasion comes from a purpose to deceive, or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties, and the law ought not to permit, and will not permit, the continuance of the invasion, whatever may have been its origin. If the ruling in *Millington* v. *Fox* (2) be law, as it is clearly in consonance with policy, justice, and common sense, the fact of misleading, or the tendency to mislead, and not the intention of the proceeding which has such a result or such a tendency, entitles the person who is injured to the protection of a Court of Equity, although the matter might be dealt with on different principles in a Court of Common Law.

On these grounds, although, I repeat, with reluctance and regret, I approve in all respects the proposal of the Lord Chancellor.

LORD BLACKBURN:—

My Lords, in this case the Plaintiffs are an American firm, who carry on the business originally established by *Isaac Merritt Singer*, and carried on by him at first alone under his own name, and afterwards in partnership with others, under the firm of *I. & U. Singer & Co.* I think it is sufficiently established that, though the name of the Plaintiffs' firm is not the same as that of the old firms, the Plaintiffs carry on, and are known to carry on the same business.

(1) Law Rep. 5 H. L. 508. (2) 3 My. & Cr. 338.

The Plaintiffs in their bill say, "The Plaintiffs and their predecessors in the said business have largely advertised the various kinds of machines of their manufacture as '*Singer*' machines, and have expended in this country since the said business was commenced, in so advertising their machines, a sum of more than £60,000, and as the result of such advertisements, and an extensive system of advertising in all other countries, their manufactures are well known throughout the world as '*Singer*' or '*Singer's*' machines, and the name '*Singer*' has become and is a trade-mark of the Plaintiffs;" and they say in the 12th paragraph, "The Defendant has for some time past been and is now manufacturing and selling to the public sewing-machines not of the Plaintiffs' manufacture as, and has on his price lists described such machines as, and has given to his salesmen and travellers directions to describe and sell such machines as '*Singer*' or '*Singer's*' machines. The course of business pursued by Defendant is calculated to mislead, and has misled, purchasers into the belief that the machines offered for sale by the Defendant are machines of the Plaintiffs' manufacture, and has injured, and if persisted in will farther injure the business of the Plaintiffs, and the Defendant threatens and intends to persist in describing machines manufactured by him as '*Singer*' or '*Singer's*' machines, and to continue the course of business aforesaid."

If these allegations are proved, it is clear that the Defendant has done wrong, and that the Plaintiffs are entitled to an injunction to prevent the continuance of the wrong. Whether they would be entitled to an injunction to the extent which is asked for in the prayer of the bill is a different question.

The Defendant in his answer in the ninth paragraph asserts that the Plaintiffs and their predecessors have made two classes of machines, which were protected or supposed to be protected under patents applying to parts of them. And he says, in the tenth paragraph, "The term '*Singer*' machine is perfectly well understood by the trade and the public to mean a sewing-machine of one of the two classes aforesaid, and that the term '*Singer*' or '*Singer's*' machines, does not in the estimation of the trade or the public, designate a machine as having been made by the Plaintiffs or their predecessors in the said business, but is merely descriptive of any

H. L. (E.) 1877 "SINGER" MANUFACTURERS v. WILSON.

machine, by whomsoever made, which is one of the classes aforesaid." And he says, in paragraph eleven: "That the '*Singer*' machines which are made by the Plaintiffs are distinguished in the market by being marked with the Plaintiffs' trade-mark, that is to say, by a device consisting of a shuttle and needles crossed with a line of cotton in the form of the letter S. surmounted with the words 'The *Singer Manufacturing Company's* trade-mark,' and that this trade-mark is affixed to all the Plaintiffs' machines, which are also marked in large letters with the words '*The Singer Manufacturing Company*,' and that such trade-mark alone, and not the name of '*Singer*' or '*Singer's*' machine is understood in the trade to import that the machine to which it is affixed is of the Plaintiffs' manufacture," and "that the Plaintiffs do not themselves use the name '*Singer*' as designating machines of their own manufacture only, but have used that term to describe merely a particular class of machine made by them, that is to say, machines with the combination of parts and of the form hereinbefore referred to."

In paragraph 14 he states what he admits to have done. He says: "I manufactured several classes and varieties of sewing-machines, and amongst others machines of the classes hereinbefore described as the '*Singer*' manufacturing machine, and the '*Singer*' family machine. I have for several years past been, and I am now, manufacturing and selling to the public sewing-machines not of the Plaintiffs' manufacture as the '*Singer*' machine, but not as '*Singer's*' machines. I have on my price list described such machines as, and I have given to my salesmen and travellers directions to describe and sell such machines as, our '*Singer*' machine, meaning those made by my said firm, but not as '*Singer's*' machines. The only machines, however, which I sell as the '*Singer*' machines are machines having the respective combinations of parts and forms aforesaid, and being in such combinations and forms respectively made according to the inventions comprised in the expired patents hereinbefore mentioned, and according to no other patented invention, and which, as hereinbefore stated, are known to the trade under the general name of the '*Singer*' machine. Every machine sold by me, whether a '*Singer*' machine or otherwise, has attached to it in a conspicuous place a plate bearing my trade-mark—that is to say, the device of

St. George and the Dragon, surrounded by the words '*Newton Wilson & Co.*, Manufacturers, 144, *High Holborn.*' Moreover, in all my price lists (which comprise several classes and varieties of machines formerly patented and of which the patents have expired including the '*Wheeler & Wilson*,' the '*Grover & Baker*,' the '*Singer*,' and the '*Howe*,' and which are now made by me), it is expressly stated, as the fact is, that such machines sold by me are manufactured by me under the said various expired patents; and I therefore deny that the course of business pursued by me is calculated to mislead, and I do not believe it has misled, purchasers into the belief that the machines offered for sale by me are machines of the Plaintiffs' manufacture."

My Lords, these allegations, if proved to the extent here alleged, would clearly establish that the Defendant had not done anything wrong. A great deal of evidence was produced by the Plaintiffs, all of which is before your Lordships. A great deal of evidence was also offered by the Defendant. But the course taken in the Court below has been such that your Lordships do not know what that evidence was. For the Master of the Rolls, having heard and considered all the evidence produced on behalf of the Plaintiffs, thought that they had not proved any case for relief; and that being so, he considered it a mere waste of time to hear the Defendant's evidence; and, consequently, he decided against the Plaintiffs on their own case, and their own case only, without reading the affidavits in answer, and without giving the Defendant an opportunity to call *vivâ voce* evidence. The evidence tendered on behalf of the Defendant has not been brought before your Lordships, and his *vivâ voce* evidence has never been given at all.

The Lords Justices (*James*, *Mellish*, and *Baggallay*) all took the same view as the Master of the Rolls. If your Lordships, as a Court of Appeal, took the same unhesitating view as to the failure of the Plaintiffs' case, as made out on their evidence, there would have been no inconvenience arising from not having the Defendant's evidence before you. But I think that there is evidence on the Plaintiffs' case such that, if given in an action at law to recover damages, the Judge would be bound to leave it to the jury to say whether the Defendant did try to sell his own goods as and for the Plaintiffs'. If he did do so, I think the Judge would be

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

bound to direct the jury that it was a fraud so to do, and that a cause of action had arisen. I do not think that a verdict either way would have been wrong, or such that it would have been set aside. But your Lordships, as a Court of Appeal, have to determine, not whether the finding below is so unsatisfactory that it ought to be set aside, but what your own finding is.

This is not an action to recover damages for a wrong already committed, but an application for an injunction to prevent the continuance of a wrong which has been committed, and is threatened to be repeated; and I think that if it were proved that the course pursued would really produce the effect of passing off the Defendant's goods as and for the Plaintiffs', the injunction should be granted (whatever might be the case as to the account), whether the Defendant heretofore meant it to produce that effect or not. For if he persevered, as he threatens to do, in this course, after learning that it does produce this effect, he would (unless in very exceptional cases) do a wrong injurious to the Plaintiffs, and should be prevented from doing that wrong. But though the question is thus so far different from that which it would have been in an action at law, it, in my mind, is one, to a considerable extent, of degree; and one on which, on the Plaintiffs' evidence alone, different opinions might well be formed.

A correct and precise apprehension of the principles which ought to guide a Court administering this sort of relief is of great importance in considering both the bearing of the evidence and the degree of mischief which would justify the intervention of the Court.

My Lords, I am not prepared to define those principles, and if I were, it would, I think, be premature to attempt to do so at this stage of the proceedings. I prefer to say no more than that I am not as yet prepared to assent either to the position that there is a right of property in a name, or, what seems to me nearly the same thing, to assent, to its full extent, to the proposition that it is not necessary to prove fraud. Neither position has, I think, ever been the ground on which a decision of this House has proceeded. I do not wish to be understood as expressing an opinion that these positions may not be sound, but only as saying that I should require much consideration before I adopted either as the ground of a decision.

I may also say that I am not as yet convinced that the only issue raised by the Defendant is as to the extent to which the word "*Singer*" has come to designate a particular class of machines; though undoubtedly that is a very important issue.

I may also say that a trade-mark and a name used in an advertisement are not, in my mind, the same. I see no difference between the wrong done by passing off goods as or for the Plaintiffs' which are not so, by means of a trade-mark, or by means of an advertisement, yet I am not prepared at all to say that the inferences as to the facts and the relief to be given, may not depend upon whether the case is one of a trade-mark or an advertisement.

My Lords, I have not yet formed a final opinion as to whether I should, on the Plaintiffs' evidence alone, find that the course pursued by the Defendant was or was not such as to make it proper to grant the injunction. I think that in this state of doubt it would be wrong in me to come to a final determination either way, without hearing the Defendant's evidence; and, therefore, though I regret the expense it will occasion to the parties who are not to blame for this, I agree that the case should be sent back in the manner proposed.

LORD GORDON:—

My Lords, I concur with your Lordships in thinking that this case is not ripe for judgment, and that it must be remitted back for farther procedure, as the noble and learned Lord on the woolsack has proposed.

The question arises not with reference to a trade-*mark*, but to a trade *name*, to which, no doubt, different principles of law may be applicable. The averments made by the Appellants with reference to the use by the Respondent of their name are distinct, and the affidavits made in support of them go far, in their uncontradicted state, to support the averments. The allegations by the Respondent in answer are also distinct, and if proved may be sufficient to satisfy the Court that the Appellants are not entitled to the injunction sought by them. I abstain from indicating an opinion on the merits, but I think the Appellants have stated a *primâ facie* case for the injunction which they ask. I think the

H. L. (E.) 1877 "SINGER" MACHINE MANUFACTURERS v. WILSON.

case ought to be fully gone into, and the evidence adduced by both parties to be fully considered. It is to be regretted that farther expense will have to be incurred before this can be done, but I think the shape in which the case has been presented to your Lordships leaves no alternative, and I therefore concur in the judgment which has been proposed.

I may take this opportunity of saying, with reference to the case which occurred in *Scotland* as to the *Singer* sewing-machines, *The Singer Company* v. *Kimball* (1), that, though it may have been decided on a somewhat different state of facts from those which occur here, and of course is of no direct authority in this House, or in a case coming from an English Court, yet it dealt with certain principles applicable to the rules regulating the rights of parties in regard to trade names, which appear to me to be worthy of more consideration than they received from the Court below. But as your Lordships cannot at present enter on the merits of this case, I shall not farther advert to that decision.

The following Order was afterwards entered on the Journals:—

"That the order of the Court of Appeal, of the 25th of March, 1876, complained of in the said appeal, be, and the same is hereby reversed: And it is Declared, That this reversal is to be without prejudice to any question in the case in the event of farther evidence being given: And it is Ordered, That the cause be, and the same is, hereby remitted back to the Chancery Division of the High Court of Justice, with liberty to the Defendant to make again such application for leave to adduce *vivâ voce* evidence in reply to the evidence of the Plaintiffs as he may be advised, and with liberty to the Plaintiffs and Defendant to make such application as to cross-examination of the witnesses or any of them as they may be advised; and the said Court is hereby directed to dispose of the case upon the whole of the evidence: And that

(1) 11 Court of Ses. Cas. 3rd Ser. 267.

any costs which may have been paid by the Plaintiffs to the Defendant be repaid: And that the costs of the suit *ab initio*, including the costs of the appeal to this House, be in the discretion of the said Court upon the farther hearing of the case.

Lords' Journals, 13*th December*, 1877.

Solicitor for Appellants: *John N. Mason.*
Solicitors for Respondent: *Shaen, Roscoe, & Massey.*

[HOUSE OF LORDS.]

H. L. (I.) 1878 *Jan.* 31; *Feb.* 1, 4.

WILLIAM HENRY SINGLETON . . . . . APPELLANT;

AND

THOMAS TOMLINSON AND OTHERS. . . . RESPONDENTS.

Will—Additional Paper—Conversion of Real Estate—Residuary Legatee—Heir-at-Law—Costs.

15 Ch D 598
16 Ch D 698

Where a will refers to a paper, such paper cannot be incorporated with the will, unless it is clearly identified with the description of it given in the will, and is shewn to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the will for such a purpose.

The onus of establishing these two matters lies on the person who seeks to make the paper admissible for such a purpose.

The term "residuary legatee" is not of an invariable nature, it must be fashioned and moulded by the context of the will.

A will began, "I direct my executors to pay the expenses of my funeral, and all my lawful debts, out of the proceeds of my property." It went on thus, "Whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell my landed property, namely" (and then four separate pieces of landed property were named), "for its full value." Several legacies were then given, and then a fifth landed property was specially devised to *I. W.*, a person fully described, with an ultimate remainder to *T. T.*, and then came the gift of other legacies, and finally the will declared, "I constitute the said *T. T.*," describing him, "my residuary legatee." The will was written on three sides of a sheet of paper, the signature and attestation were at the bottom of the third side, the schedule was on the fourth side; it was in the handwriting of the testator, was signed by him, and bore the same date as the will. It described the four portions of landed estate, and as to the fifth landed estate said, it "is not included in the above schedule, being willed by me to *I. W.*; my executors have no control over it." The witnesses who attested the will had not seen the schedule when they made their attestation:—

Held, that, as this schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will nor referred to for the purpose of assisting in its construction:

But *Held*, also, that the will itself clearly directed the whole of the testator's real estate (except the portion specifically devised to a particular person) to be turned into money, so as to be converted out and out, not for a special purpose only, but for the general objects of his will, and that, after satisfying those objects, the surplus went to the residuary legatee, and not to the heir.

In a suit upon the construction of a will, the Court directed that the heir-

H. L. (I.)
1878
SINGLETON
v.
TOMLINSON.

at-law should be made a party. He was so. The Vice-Chancellor decided that he was entitled to the residue. The Court of Appeal reversed that decision. On appeal to this House, the order of the Court of Appeal was in substance affirmed. But under the circumstances of the case the heir-at-law was not treated as an ordinary Appellant in a case of construction of a will, but was ordered to be allowed his costs in the Court below and in the appeal.

Observations on words used in the order of the Court below.

THIS was an appeal against an order of the Court of Appeal in Chancery in *Ireland*, made on the 9th of January, 1877, by which a decree previously made by Vice-Chancellor *Chatterton*, dated on the 27th of June, 1876, was reversed (1).

Thomas Singleton, of *Bagnalstown*, in the county of *Carlow*, by will, dated the 11th of October, 1871, directed his executors "to pay the expenses of my funeral, and all my lawful debts, out of the proceeds of my property." The will went on thus: "Whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell, in the Landed Estates Court, my landed property, namely, *Clough Sutton, Monemore, Rudkins Pound*, and *Old Leighlin*, in the barony of *Idrone West*, for its full value." Several legacies were then given to different individuals, and the will went on: "to *Isabella Watson* my interest in the house No. 2, *St. Alban's Terrace, Dublin*, in which she now resides, and also my fee simple holding in *Clonmackshane*, during the period of her life, and, at her death, it is my will that it shall go to her nephew, *John Frederick Watson*, as it belonged to his ancestors; but should he die without lawful issue, it is my will that it shall go absolutely to *Thomas Tomlinson*, the eldest son of the late Surgeon *William Tomlinson*. I give and bequeath to *Jane Arundell* my plate, house linen, furniture, and all other effects in my house at the time of my death, and I constitute the said *Thomas Tomlinson*, son of the said Surgeon *William Tomlinson*, my residuary legatee." The testator then named three persons whom he appointed his executors.

This will was written on three sides of a sheet of paper, and the signature and attestation were at the bottom of the third side.

The testator died on the 27th of October, 1872, and the will

(1) *Nom.* in the Court of the Vice-Chancellor, *Watson* v. *Arundell*, Ir. Rep. 10 Eq. 299; in the Court of Appeal, *Watson* v. *Arundell*, Ir. Rep. 11 Eq. 53.

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

was proved in the *Kilkenny* District Registry of the Court of Probate in *Ireland*, on the 28th of December, 1872, but the grant of probate was confined to the three sides of the sheet of paper, being refused as to the fourth side thereof. That fourth side contained a writing headed "Schedule referred to within," being a schedule of the testator's landed property. It was signed by him, and bore the same date as the will, but was not attested (1).

On the hearing before the Court, the witnesses who attested the will could not speak with any confidence as to the existence of any writing upon the fourth side of the sheet of paper. It had not been shewn to them.

An administration suit was instituted in *Ireland*, but, on motion for a decree, the Court thought that the suit was defective for want of parties, as the testator's heir-at-law had not been made a party thereto. The suit accordingly stood over—advertisements were inserted in the newspapers—and, on the 22nd of April, 1874, the

(1) This schedule was in the following form:—

"SCHEDULE REFERRED TO WITHIN, VIZ.:—

	£ s. d.	£ s. d.	£ s. d.
Rental of *Cloughsutton*, and my part of *Monemore* ..	..	688 9 9	
Head rent	177 5 8		
Rent charge on *Monemore* ..	2 16 9	180 2 5	508 7 4
Rudkins Pound, Monemore, and *Old Leighlin*	..	213 4 1½	
Head rent	57 9 9		
Rent charge	9 18 8	67 8 5	145 18 8½
House and premises let to Mr. *Ward*. (See lease)	..	130 0 0	
Head rent	..	27 13 10	102 6 2
Farm at *Rathellan*, set to *John Bolger*. (See his lease) ..	..	134 0 10	
Head rent	..	85 0 0	49 0 10
Money in the Funds	..	3699 17 9	105 6 10
Mr. *Newton's* mortgage	..	1300 0 0	65 0 0
Rev. *Alexr. Durdin's* do. ..	..	500 0 0	25 0 0
Thomas Corrigan's do., *Kileny*	..	1000 0 0	50 0 0
			1050 16 10½

"N.B.—*Clonmackshane* is not included in the above Schedule, it being willed by me to *Isabella Watson*; my executors have no control over it.

"*Thomas Singleton.*"

"October 11th, 1871."

H. L. (I.)
1878
SINGLETON
v.
TOMLINSON.

bill was finally amended by making *William Henry Singleton* (decided to be the heir-at-law), and the Attorney-General for *Ireland* Defendants. The cause was afterwards brought to a hearing; other necessary proceedings were taken, and on the 27th of June, 1876, the Vice-Chancellor of *Ireland* made a decree declaring that the funeral expenses and debts were payable out of the personal estate, and the proceeds of the real estate directed to be sold, rateably, according to the respective values of the same, and that the pecuniary legacies were payable only out of the personal estate, and, if such personal estate was insufficient for the same, that the said legacies should abate rateably. And that the surplus proceeds of the testator's real estate directed to be sold, were not disposed of by his will, and that the same accordingly descended to *William Henry Singleton*, as the testator's heir-at-law. The costs were ordered to come out of the personal estate.

The case was brought before the Court of Appeal in Chancery in *Ireland*, and was heard before the Lord Chancellor of *Ireland*, the Lord Justice *Christian*, and Mr. Justice *Lawson*. On the 9th of January, 1877, the Court of Appeal made an order that the decree of the Vice-Chancellor "be reversed so far as it declares that the pecuniary legacies given by the testator's will are payable only out of his personal estate, and that the surplus proceeds of the testator's real estate, directed to be sold, were not disposed of by his will, and that the same descended accordingly to his heir-at-law; and also, so far as the same declares that the Defendant *W. H. Singleton* as heir-at-law, and the several claimants," &c. (there being several persons who had put in claims under the advertisements), "entitled to any costs in this suit—and, instead thereof, the Court doth declare that the several legacies given by the said will are payable both out of the personal estate, and the proceeds of the real estate of the testator directed to be sold; the said personal estate and the proceeds of the real estate being constituted a mixed or blended fund in the hands of the executors to answer the purposes of the will generally. And the Court doth farther declare that the residue of the said fund, after payment of the testator's funeral and testamentary expenses and legacies, passed to the Appellant (*Thomas Tomlinson*) as residuary legatee. . . . And it is farther ordered that the Defendant, *W. H.*

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

Singleton, and the several claimants respectively, do abide their own costs incurred in this cause, up to and including the 27th of June, 1876. And it is farther declared that the Plaintiffs and the Defendants respectively (other than *W. H. Singleton*) are entitled to their costs incurred in this cause, up to and including the said 27th of June, 1876, the Plaintiff's costs to be taxed as executor's costs; and that the same are payable out of the personal estate and the proceeds of the real estate of the testator directed to be sold. And that the decree of the Vice-Chancellor do in all other respects stand affirmed; and that the Plaintiffs are entitled to their costs of appearing on this appeal, such costs to be taxed as executor's costs. And, that the Appellant *Thomas Tomlinson*, and the Defendant *William Henry Singleton*, do respectively abide their own costs incurred on this appeal matter."

The appeal to this House was brought against this order.

Mr. *Law*, Q.C. (of the Irish Bar), and Mr. *Vaughan Hawkins*, for the Appellant:—

The schedule does not form any part of the will, and cannot properly be incorporated with it, or considered by the Court with a view to the construction of the will. Yet that schedule has been treated in the Court below as explaining the will and enabling the Court to construe it. *Allen* v. *Maddock* (1) shews that before it can be treated as incorporated in the will, there must be satisfactory evidence as to the execution of the paper itself, and as to the date of its execution. There was no such evidence here, the witnesses who attested the will had never seen it, and for anything that appeared to the contrary, it might have been written just before the death of the testator, and consequently the fourth page could not be incorporated with the will: *In the Goods of Watkins* (2); *In the Goods of Dallow* (3); *In the Goods of Edwards* (4); *In the Goods of Brewis* (5); *In the Goods of Mathias* (6); *In the Goods of Ash* (7).

(1) 11 Moo. P. C. 427; see *Lady Truro's Case*, Law Rep. 1 Pr. & Div. 201.
(2) Law Rep. 1 Pr. & Div. 19.
(3) Ibid. 189.
(4) 6 Notes of Ecc. Cas. 306.
(5) 3 Sw. & Tr. 473; 33 L. J. (Prob.) 124.
(6) 3 Sw. & Tr. 100; 32 L. J. (Prob.) 115.
(7) 1 Deane, 187.

There is not here any necessity to search for extrinsic evidence to explain the will, for the will has no ambiguity that requires it: *Jones* v. *Tucker* (1); *Stephenson* v. *Heathcote* (2). The direction to sell the real estate here is a direction given for a particular purpose only. When that purpose is answered, the money obtained on the sale of the real estate returns to its former condition, and being then undisposed of by the provisions of the will, passes to the heir-at-law. That proposition is fully established by the judgment of Lord Chancellor *Cranworth* in *Taylor* v. *Taylor* (3), where the case of *Phillips* v. *Phillips* (4), which appeared to lay down an opposite doctrine, was distinctly overruled. The rule as stated by Lord *Cranworth* had long before then been established, and was recognised in many cases: *Kellett* v. *Kellett* (5); *Parker* v. *Framley* (6); *Roberts* v. *Walker* (7); *Maugham* v. *Mason* (8).

The Courts have never favoured implications which would have been supposed to make the personal estate exempted, in the whole, or even partially, from the payment of debts and legacies, or would have made real and personal estate a mixed or blended fund for such a purpose: *Bootle* v. *Blundell* (9); *Jones* v. *Tucker* (1); *Hensman* v. *Fryer* (10). There cannot be a mixed fund created except by clear and express words: *Boughton* v. *Boughton* (11).

It is a rule in Equity that where real estate is directed to be converted into personalty, for a purpose which fails, either wholly or partially, to that extent the money itself is considered real estate: *Hill* v. *Cock* (12); *Chitty* v. *Parker* (13); *Flint* v. *Warren* (14). A very strong case was that of *Windus* v. *Windus* (15), and another was that of *Amphlett* v. *Parke* (16), where a testatrix gave her real estates upon trust to be sold, and in words directed the moneys to arise from such sale to be considered and taken as part of her personal estate. Out of these moneys and out of all other her

(1) 2 Mer. 533.
(2) 1 Eden, 38.
(3) 3 De G. M. & G. 190.
(4) 1 My. & K. 649; see also *Jessopp* v. *Watson*, Ibid. 665.
(5) 1 Ball & B. 533; 3 Dow. 248.
(6) 2 Si. & St. 592.
(7) 1 Russ. & My. 752.
(8) 1 V. & B. 410.
(9) 1 Mer. 193.
(10) Law Rep. 3 Ch. Ap. 420.
(11) 1 H. L. Cas. 406.
(12) 1 V. & B. 173.
(13) 2 Ves. J. 271.
(14) 16 Sim. 124.
(15) 6 De G. M. & G. 549.
(16) 2 Russ. & My. 221; reversing 1 Sim. 275.

H. L. (I.) 1878 — SINGLETON v. TOMLINSON.

personal estate certain pecuniary legacies were to be paid, and the residue of her personal estate and the moneys arising from the sale of her real estate were given upon trust for two persons and their children. Some of the legatees died in her lifetime. It was held that the conversion of the real estate was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of these as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir-at-law. That case was very important, not merely on account of the peculiarly strong expressions to be found in the will, but because the decision of the Court below had been reversed by the Lord Chancellor after very full consideration. And that reversal had never been impeached by appeal.

The decree here is wrong as to costs. The heir-at-law was a necessary party. The Court required him to be introduced as a party to the suit, and he is entitled, whatever may be the final result of the case, to his costs, even though the Court may alter the decree of the Court below as to the merits: *The Attorney-General* v. *The Haberdashers' Company* (1).

[*Inchiquin* v. *French* (2), *Smart* v. *Prujean* (3), *Abbott* v. *Middleton* (4), *Wigram* on Extrinsic Evidence (5), *Page* v. *Leapingwell* (6), *Fitch* v. *Weber* (7), *Rhodes* v. *Rudge* (8), *Gibbs* v. *Ougier* (9), *Greville* v. *Browne* (10), *Hope* v. *Potter* (11), *Berry* v. *Usher* (12), *Tench* v. *Cheese* (13), *Jarman* on Wills (14), and *Doe* d. *Hiscocks* v. *Hiscocks* (15) were also, among many other cases, cited.]

Mr. *Kay*, Q.C., and Mr. *Walker*, Q.C. (of the Irish Bar) (Mr. *W. Kenny*, of the Irish Bar, was with them), for the Respondents:—

First, as to the incorporation of the schedule with the will. It is clear that if that schedule is not incorporated the will may be

(1) 4 Bro. C. C. 178.
(2) Amb. 33.
(3) 6 Ves. 560.
(4) 7 H. L. Cas. 68.
(5) Prop. vii. pl. 150 *et seq.*
(6) 18 Ves. 463.
(7) 6 Hare, 145.
(8) 1 Sim. 79.
(9) 12 Ves. 413.
(10) 7 H. L. Cas. 689.
(11) 3 K. & J. 206.
(12) 11 Ves. 87.
(13) 6 De G. M. & G. 453.
(14) Vol. i. p. 548.
(15) 5 M. & W. 363.

imperfectly understood and applied. The will refers to the schedule in the most direct terms: "Whereas I am possessed of landed and chattel property as stated in the annexed schedule;" and that property is there distinctly stated and described; that which is to be dealt with by the executors and sold is set forth, and there is a clear and express distinction made between that property which was to be sold and to form part of the general fund, and that one portion, which was specifically made the subject of a particular devise, and was not to be sold at all. The testator signed this schedule, which, indeed, was in his own handwriting, and had the date of the will itself, but he did not suppose that it was necessary to have it, like his will, attested. Few people would have imagined that it required to be attested; it was a description by himself, a memorandum of the property he possessed and was then dealing with. His will declared how that property was to be disposed of. Being written on the fourth page of the same sheet of paper as the will, there could be no reasonable doubt that the schedule had been prepared at the same time and was written before the will was executed: *Quihampton* v. *Going* (1), where the Master of the Rolls held that entries in a ledger made by the testator, though not admitted to probate, having been referred to in the will could be looked at by a Court of construction, and were, indeed, for the purposes of the distribution of the estate conclusive. The schedule here must have been written before the will was signed, for it is spoken of in the will as an already existing thing, and therefore, according to all the authorities, it was admissible in evidence, even though it might not be treated by the Ecclesiastical Court as a part of the will itself. The testator so meant it. [LORD BLACKBURN:—He should have said "indorsed" but he has said "annexed," and that is the strength of the argument on the other side.] The difference in the words is not important. *In the Goods of Watkins* (2) does not apply; the testatrix there did not write all the papers, and it was clear that they were written at different dates. But here the will speaks as if the schedule was in actual existence, for such must be the meaning of the words "hereto annexed," an expres-

(1) Weekly Notes (1876), p. 209; 24 W. R. 915.

(2) Law Rep. 1 Pr. & Div. 19; see *The Goods of Lady Truro*, Ib. 201.

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

sion indicating a present existing thing and not a thing to be prepared at some future time. It is necessary to refer to this paper in order that the Court may by obtaining a full knowledge of the facts put itself into the position of the testator: *Charter* v. *Charter* (1); a course required when any doubt arises as to the meaning of words used in a will, so as to make the Court able the better to judge of the testator's intentions: *Wigram* on Extrinsic Evidence (2). It must sometimes be impossible to understand the real intentions of a testator without a knowledge of the circumstances under which he wrote the words which in the will may have an equivocal and a doubtful meaning: *Barksdale* v. *Gilleatt* (3). It is said on the other side, that the intention of the testator as to creating a mixed or blended fund is doubtful. If so, the consideration of this schedule is necessary to elucidate that doubt.

The Respondent insists on the admissibility of this schedule, though he does not admit that the construction of the will is open to doubt. There was in this will a direction for the absolute conversion of all the testator's property into money, and what remained of the money after fulfilling the general purposes of the will thereupon become the property of the residuary legatee. This will could not be carried into effect if there had not been created a mixed and blended fund. The real estate here was not to be sold for a limited and special purpose, but for all the purposes of the will, and the various cases where the sale was for a limited purpose only were therefore inapplicable here. This case resembled that of *Mallabar* v. *Mallabar* (4); *Allan* v. *Gott* (5). The principle was applied in *Hawkins* v. *Chappel* (6).

Kellett v. *Kellett* (7) is not an authority against the Respondent. The words there were different. Lord Chancellor *Manners* doubted about them, and only gave his judgment in favour of the heir because of the equivocal nature of the words used, and in this House the observations of Lord *Eldon* and Lord *Redesdale* shew

(1) Law Rep. 7 H. L. 364.
(2) 4th Ed. Prop. V.
(3) 1 Sw. 562.
(4) Cas. t. Tal. 78.
(5) Law Rep. 7 Ch. Ap. 439; see also *Irvine* v. *Sullivan*, Law Rep. 8 Eq. 673; and *Spencer* v. *Wilson*, Law Rep. 16 Eq. 501.
(6) 1 Atk. 622.
(7) 1 Ball & B. 533; 3 Dow. 248.

that they proceeded on the same principle, thinking that where there was a doubt it ought to be given in favour of the heir. There is no such doubt here.

As to the costs, it is submitted that the ordinary rule as to costs must be adopted in this case.

[*Durour* v. *Motteux* (1), *Hardacre* v. *Nash* (2), *Dixon* v. *Dawson* (3), and many other cases were cited and commented on.]

Mr. *Law* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, it will be convenient in this case, in the first place, to make some observations upon a part of the case which occupied a good deal of the discussion in the Court below, but which I think may, by a very few observations, be removed altogether from the range of consideration. The testator had distinctly said in his will, which your Lordships have to construe, that he was "possessed of landed and chattel property as stated in the annexed schedule," and, his will being written on the first three sides of a sheet of paper, on the fourth side there appeared to have been written a schedule setting out, by way of description, the particulars of certain real property, and then the particulars of certain personal property, and this schedule appeared to be dated on the same day as the will, and to be signed by the testator. The schedule was not admitted to probate, nor indeed (though signed) was it signed and executed in the presence of witnesses as the *Wills Act* requires.

The question which arose in the Court below was whether in construing the will and in determining what the meaning of the testator was, this schedule could be looked at; and, my Lords, on that point it will be quite sufficient if I refer to the two propositions which were laid down, and which indeed were not challenged by any of the counsel at your Lordships' Bar. It was said that there are certain cases in which, although a document is not admitted to probate, still it may be referred to in a will in such a way as that you are entitled to look at the document, because it

(1) 1 Ves. Sen. 320. (2) 5 T. R. 716.
(3) 2 Si. & St. 327.

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

is virtually incorporated in that which is admitted to probate; and the two propositions which were laid down as the tests of the case in which a document under those circumstances could be looked at were these: first, that it must be clearly identified by the description given of it in the will; and secondly, that it must be shewn to have been in existence at the time when the will was executed.

With regard to the first of these propositions, no controversy, I think, was raised, but the schedule to which I have referred was taken as identified with the schedule spoken of in the will. But with regard to the second, those who object to the schedule being looked at, say that there is no sufficient evidence to prove that this schedule was in existence at the time when the will was executed. So far as the words are concerned, they would be satisfied by a schedule written on the last page of the will after the will was executed; and those who contended for the admissibility of the schedule did not carry their argument beyond this, that it might well be concluded that the testator, speaking, as he has spoken, of the schedule, would have had the schedule prepared on the back of his will and signed before the will was signed. My Lords, it appears to me that this is one of the cases in which the *onus* is clearly thrown on those who contend for the incorporation of the particular document to prove, by parol extrinsic evidence, that the document was in existence at the date of the will. Here they prove nothing of the kind, for the witnesses who were present at, and attested, the execution of the will, have no recollection of seeing the schedule and cannot give any explanation in regard to it. The words used in the will would, as I have said, be as well satisfied by a schedule annexed to the will after it was executed as by a schedule in existence at the time the will was executed. Therefore I feel myself obliged to come to the conclusion that there is not here that evidence, that the schedule was in existence at the time the will was executed, which is necessary in order to entitle us to look at it. Although I have come to this conclusion, I do not think that in the result the decision of your Lordships will be very much affected by the exclusion of the schedule. I think it right, however, to say what I have said, inasmuch as a very considerable part of the judgment of the Court of Appeal in

Ireland was occupied with the discussion of the question of whether this schedule was or was not admissible.

My Lords, it was farther argued that even if the schedule was not to be looked at as incorporated in the will, still you are at liberty here to take a note of what the state of the property of the testator was at the time his will was made, and of his knowledge of the state of his property. I shall have a word to say about that presently. I only mention the argument now for the purpose of reminding your Lordships that it was urged before you.

Now, passing from these topics I come to that which really is the great question in the case—the construction of the will itself; and here, I think your Lordships will find, as generally is found in cases of the kind, that although decided cases may be of great value in laying down and establishing certain principles, still when the question is the meaning of a particular will, that meaning must be derived, after all, from the consideration of the whole context of the particular will which you have to construe.

The particular will which is now before your Lordships is not of very great length, and for the present purpose there are three parts of it to which I will specially direct your attention. At the outset, however, I must remind you that the construction which the Appellants seek to put upon this will would have a result which no Court would arrive at, unless it very clearly saw that that result was necessary. Although you are dealing with the estate, and with the will, of a testator who certainly appears upon the face of his will to have contemplated a disposition of the whole of his property, for he speaks of his "landed *and* chattel property," the construction contended for would have the result of making that testator die intestate, as to the whole, or very nearly the whole, of his real property.

Passing therefore to the will, I must point out to your Lordships that there are three particular parts or divisions of the will which have to be read together. The first is in these words: "I authorize my executors to pay the expenses of my funeral and all my lawful debts, out of the proceeds of my property." My Lords, I stop there for the purpose of making two observations. The words "the proceeds of my property" are not here limited in any way, and they must mean the proceeds of my property of every

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

description. If provision has been made for converting his real property into money, the real property so converted into money, will become part of the "proceeds" which are here spoken of. With regard to his personal property the executors *virtute officii* will have the power, and the duty, of converting it into money, and it again will become "proceeds of my property" within the words of the will. The authorization therefore is one to pay the expenses of the funeral and the lawful debts out of the money proceeds of both the real and the personal property.

The other observation I have to make is this; this is not an authority to the executors to turn real estate into money, in order to pay debts and funeral expenses, but it is a direction which presupposes that under some order contained in some other part of the will the real estate will have been converted into money, and then, treating it as money, there is an authority, out of that money, to pay the debts and the funeral expenses. My Lords, the case is therefore, at the very outset, distinguished from those cases where a direction is given to executors to sell the real estate, or an authority is given to sell the real estate in order to pay debts. There the reason is considered to shew the extent of the authority, and there is no authority to convert except for the purpose of paying debts and funeral expenses.

My Lords, the second branch of the will is this: "Whereas I am possessed of landed and chattel property as stated in the annexed schedule, I direct my executors to sell in the Landed Estates Court my landed property, namely," and he enumerates then four denominations of his landed property, "for its full value." My Lords, here again I pause for the purpose of observing the marked contrast which there is between the two sentences I have read. As to the funeral expenses and the debts, the words were "I authorize my executors to pay out of the proceeds of my property;" as to the sale of landed property it is not an authority to sell, but an absolute and unqualified direction to sell the whole of the landed property (with the exception of one piece specifically devised), in the Landed Estates Court for the best price that can be obtained.

Now, that being the second branch of the will, the third is this: a bequest of certain pecuniary legacies, a gift of plate, and house

linen, and furniture specifically, and a winding-up of the sentence with these words, "I constitute the said *Thomas Tomlinson*, son of the said Surgeon *William Tomlinson*, my residuary legatee."

Your Lordships therefore have to deal with a will which in substance is this; I authorize my executors to pay my debts out of the proceeds of my property. I direct my executors to sell all my landed estate in the Landed Estates Court for the best price that can be obtained. I give certain legacies which I have enumerated. I leave my furniture and plate to one particular legatee, and I constitute *Thomas Tomlinson* my residuary legatee.

Now, let us disembarrass our minds for a moment of any decided case upon the subject. Have your Lordships any doubt that if you placed a disposition worded as I have described before any man of common intelligence and understanding he would say at once, that is a complete scheme of disposition of the whole of the testator's property of every kind, his intention is that his property should be turned into money; that his debts and his legacies should be paid; that the furniture and plate which he specifies should be given to the person to whom it is bequeathed, and that he who is described as his "residuary legatee" should become entitled to the whole of the surplus? My Lords, the arrangement of the clauses to which I have referred can make little or no difference. It would have been, not very much plainer, but somewhat plainer, if the direction to sell the whole of the landed property had been the first direction contained in the will; but the circumstance that that is preceded by a clause which itself, upon the face of it, anticipates and prepares you for that which is coming, when it speaks of the "proceeds of the property," cannot make any difference whatever, and the will may be read as if the direction to sell the landed property had been the first direction contained in it.

My Lords, I am unable to think that any of the authorities which have been cited have any bearing adverse to the construction which I have submitted of this will. Many of them would fortify that construction. There is no doubt that if you found the term "residuary legatee" standing alone, above all, if you found it in a will which appeared to make a division between real property and personal property, the *primâ facie* meaning of "resi-

H. L. (I.)
1878
SINGLETON
v.
TOMLINSON.

duary legatee" would be the person taking what the law calls the residue of the personal property; but it is a term which must be fashioned and moulded by the context, and if you have a context in which the testator is found looking at his landed property, not as land, but, as something which is all to be sold and turned into money, then the term "residuary legatee" becomes a term as applicable to the proceeds of landed property as it would have been in the first instance to personal property.

My Lords, it is here that I feel disposed to make an observation upon the argument that you might look outside the will and endeavour to find what the state of the property of the testator was, what the amount of his personalty was at the time when the will was executed. My Lords, I do not desire to consider very narrowly what is the state of the authorities upon that point, as to how far you can and how far you cannot look at the state of a testator's property; I am quite content to take it as I ventured to put it to the learned counsel at the Bar—that the testator must have considered at the time when he made this will, either that his personal property was sufficient for the payment of his legacies or that it was insufficient. Let it be supposed that he thought that his personal property was sufficient for the payment of his legacies. If that was his state of mind, then I ask for what purpose was it that he directed his real estate to be sold? He could not upon that hypothesis have done it for the purpose of paying his debts, because his debts ought to have been paid or provided for before the personalty could be applied to the payment of legacies. It must, therefore, have been that he intended a general conversion of his landed property to be made for the whole of the purposes of his will, including the disposition of the residue. But if on the other hand you suppose that his mind was that his personalty would be insufficient for the payment of his legacies, then I ask again upon what footing did he bequeath these legacies? How were they to be paid except by means of the sale of the real estate which he directed? If that was his mind and intention you find a general conversion again necessary not for a limited purpose, but for all the purposes contained in the will.

My Lords, these considerations leave no doubt whatever in my mind, and I think your Lordships entertain no more doubt than I

do, that the construction of this will is such that the residuary legatee named in the will takes the whole residue of the property of the testator after the payment of debts and legacies; and, that being the view of the Court of Appeal in *Ireland*, I shall submit to your Lordships that with one verbal alteration which I shall afterwards notice, the decree to that effect should be affirmed.

My Lords, it appears that in the Court of Appeal a farther question arose which, I am afraid, is a very substantial question in this case, and not merely one of form,—the question of the costs of the litigation. The Appellant at your Lordships' Bar is the heir-at-law. After the suit was instituted in the Court of the Vice-Chancellor in *Ireland*, it of course became obvious that the heir-at-law must be a party in order to have a decision upon his rights before the estate could be administered. The present Appellant was a distant relative of the testator, and there was a controversy with other parties as to whether he or one of them was the heir-at-law. It appears that there was a considerable amount of litigation before that point could be determined. It is not suggested that any impropriety of conduct is attributable to the Appellant in the course of that litigation. The litigation resulted in its being determined that he, and not any of the rival claimants, was the heir-at-law. Under those circumstances the Vice-Chancellor gave to the Appellant out of the estate his costs of establishing the heirship, and farther, his costs of the general suit in which the rights of the parties were declared. My Lords, I own that I think that provision for costs was in accordance with what I have always understood to be the rule of the Court of Chancery, a rule which I must say appears to me to be founded in common sense and common justice. The heir-at-law was a necessary party, for of course the Court could not act without him; therefore it was only fair that his costs should be provided by other parties. As regards the question of the construction of the will it is not he who has created the difficulty but the testator, and it is only fair that, the testator having created the difficulty, his estate should pay for the removal of that difficulty.

Consequently it appears to me that, independently of the decision of the Vice-Chancellor upon the main point, the point of construction, the decision of the Vice-Chancellor as to the costs

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

was a correct one and ought not to have been interfered with by the Court of Appeal. I submit, therefore, my Lords, that, the decision of the Vice-Chancellor having been in favour of the heir-at-law upon the construction, and the heir-at-law having appeared before the Court of Appeal merely to support the decision given in his favour, the Court of Appeal should have permitted him to add his costs in the Court of Appeal to the costs he had had in the Court below. I submit therefore, and move your Lordships, that in this respect the order of the Court of Appeal should be reversed, although I should propose that upon the merits as to the construction of the will it should be affirmed.

My Lords, the alterations which I should suggest to be made are these:—[His Lordship stated them as they were afterwards embodied, formally, in the Order entered upon the Journals (see *post*, p. 428). In the course of his statement, his Lordship, with reference to a particular expression in the Order of the Court of Appeal, said:—] I propose to your Lordships to leave out these words: "the said personal estate and the proceeds of the real estate being constituted a mixed or blended fund in the hands of the executors to answer the purposes of the will generally." My Lords, it is immaterial to the present case whether the fund is called a "blended fund" or not. I do not think it has been the habit to introduce into decrees that which is merely a technical mode of description used in argument; the reference therefore to that expression had better be left out.

My Lords, with regard to the appeal to your Lordships' House, I think, under the circumstances, your Lordships will not make any order as to costs.

LORD HATHERLEY:—

My Lords, I entirely concur in the view which the Lord Chancellor has taken of this case.

In the first place, as regards the primary point concerning the merits of the case itself, I wish very briefly to consider the will as it stands before us without reference to decided authorities, and also apart from the document which is said to be referred to in the will, namely, that which is called the schedule of the testator's property. I will assume for the present that that document

is not to be looked at, and that we simply have before us the will of the testator, and that we have to decide in what manner he intended to provide for the execution of his intentions, and what those intentions were. It is clear upon the scheme of the whole will that he trusts to the executors,—not the persons to whom he makes express devises, but to his executors,—for the carrying out of all the purposes he has expressed in his will. He knows it to be the duty of the executors to pay debts, and funeral and testamentary expenses, and his legacies, and, that being so, he proceeds, as it seems to me, to place his executors out of the "proceeds of my property" in funds for all these purposes. I stay there for a moment just to say that the words "my property" must include personalty at all events, and, standing alone, without anything to contradict such a meaning, they would include real estate also. But his saying, "out of the proceeds of my property" involves this, that there was present to his mind the executors' power, and not only their power but their duty, in all cases except where there is a devise, to turn personal estate into money. He assumes, therefore, that the personal property will be in the hands of the executors; but he proceeds to express still more fully what he means by "my property," by making a disposition which hands over to them the real estate there specified, for all the purposes, as it appears to me, of his will. No other purpose, can I, any more than could the Lord Chancellor, imagine for which he could place his real property in the hands of the executors. He says that his funeral expenses and debts are to be paid out of the proceeds of his property, and then he proceeds to direct his executors to sell in the Landed Estates Court his "landed property, namely," and he named every estate which he appears to have had in the shape of freehold property, with the exception of one particular estate which is given afterwards to a particular devisee. He orders that landed property to be sold for its full value. In this way he has got into his executors' hands a fund which he calls "the proceeds of his property," from which they may pay his funeral expenses and his debts, and any legacies given by the will; accordingly he has provided a fund which is, in my opinion, for the execution of all these purposes. Then he proceeds to specify the legacies.

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

Now, my Lords, it has occurred to me more than once that if he had introduced one single word, that would have disposed of all the argument we have heard upon this occasion, that is to say, supposing, after the direction to sell his landed property in the Landed Estates Court, for its full value, he had introduced the word "and," and had said "*and* I leave and bequeath £1000 to the Bible Society, and £500 to the Hospital for Incurables in *Dublin*," and so on—the will would then have run on in one continuous phraseology. It would have been in effect this. I have given directions as to one part of the executors' duty, namely, the payment of my funeral expenses and my debts and legacies. I have put them in funds for the purpose of doing so, and now I proceed to specify the legacies. But, my Lords, no objection can arise from the word "and" not being there. It is simply that the testator, after placing his executors in funds for the discharge of all the duties incumbent on them as his executors, proceeds to enumerate the different things that he wishes them to do in their office of executors; and amongst those things he places the payment of legacies. I must say that except for the learning which has been brought to bear upon this case, and at considerable length, I never should have had any doubt in construing this will according to the plain intentions of the testator as to what was that testator's real meaning.

In a subsequent part of the will, after giving the money legacies, the testator gives a particular estate to *Isabella Watson*. This all follows, as your Lordships will observe, the words "I leave and bequeath;" that is the governing phraseology of the whole of the bequests. When he comes to *Isabella Watson* he gives her "my interest in the house No. 2, *St. Alban's Terrace, Dublin*, in which she now resides, and also my fee simple holding in *Clonmackshane* during the period of her life; and at her death it is my will that it shall go to her nephew, *John Frederick Watson*, as it belonged to his ancestors; but should he die without lawful issue, it is my will that it shall go absolutely to *Thomas Tomlinson*." That is the person who is now the Respondent, and who is the residuary legatee. Then he gives some plate and house linen and furniture to *Jane Arundell*, and then he says, "and I constitute the said *Thomas Tomlinson*, son of the said Surgeon *William*

Tomlinson, my residuary legatee." He excepts, therefore, for such reasons as seemed to him satisfactory, one particular portion of his freehold property. He gives a life interest in it to one particular devisee, and he then gives it over to *Frederick Watson*, with a reason assigned; and if *Watson's* issue fails, it is given to this *Thomas Tomlinson*, whom he also, as I hold, constitutes residuary legatee of the whole property which he has so placed in his executors' hands for the purpose of executing the dispositions of his will.

This is not a power to sell in order to pay debts or to pay legacies, but it is an absolute and positive direction to sell in order to place in the hands of his executors the "proceeds of my property," proceeds which are to form the fund for their carrying into effect all the intents and wishes he has expressed in his will, including the bequests and legacies. Taking that view of it, I do not think it at all necessary to consider what the amount of his personal estate was at the time of his making his will, nor what the amount of his debts was. It seems to me simply, taking the words of the will as they stand, he has put into the hands of his executors this considerable fund, to be formed from the proceeds of the sale of the real estate; and when those executors have, by means of that fund, carried into effect the wishes the testator has expressed in the will; the residue of the fund is to go to the residuary legatee, who is the person now at your Lordships' Bar as the Respondent in this case.

Really, with regard to the authorities which have been cited, I must say that I feel that which almost every Judge before whom a mass of authorities has been cited upon the construction of a will is in the habit of saying, namely, that very little assistance can be derived in the construction of wills from authorities. A certain amount of principle is established, and certain settled and fixed rules of construction are laid down, but they are fixed subject to a very important qualification with regard to intention. Certain fixed rules of construction have no doubt been established which may well be referred to, and your Lordships never object to such reference. Amongst other things it is, no doubt, laid down what is the primary meaning of a "residuary legatee" standing alone; but the wills of testators are always to be construed, in the first

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

instance, according to what can be plainly and sufficiently collected from the words the testator has used, however untechnical may be his application of them, subject always to this, that the decided cases are landmarks to prevent any Court from assuming, from a supposed intention, which may be apparent to the mind of one Judge, and not so apparent to the mind of another, anything contrary to the settled construction of the particular class of words, unless there is something in the particular will which necessarily requires it. Such rules may be applicable from time to time, but it is very rarely that they can be applied to the case before the Court. The case of *Kellett* v. *Kellett* (1) at first struck me with surprise, and appeared to have, to some extent, a bearing upon the case before us; but when the judgments of the two learned Lords who decided that case in this House come to be read, I think it will be seen very clearly that they afford very little assistance as such a landmark as I have described, namely, by way of fixing and settling the meaning of a phrase, unless that meaning is contradicted by the other contents of the will.

This case, my Lords, is one in which upon the plain and simple construction of the words of the will there can be no doubt or difficulty whatever in seeing that the testator contemplated having his will performed as he has expressed it. He contemplated who the persons were who were to perform it, namely, the executors; he contemplated their performing, as they were bound to do, their duties with his personal estate, and placed in their hands the real estate for the same purposes, the general purposes of the will. He did so with an absolute and positive direction to sell it for the purposes of the will.

With regard to the costs, I think the question is of too plain a nature to need argument. I see no reason in this case for a departure from the ordinary course, namely, giving the heir-at-law his costs of proving his heirship, and also his costs of appearing at at the hearing.

LORD BLACKBURN:—

My Lords, I entirely concur in all respects in the opinions which have been pronounced. A great deal of the argument in the

(1) 3 Dow. 248.

Court below, and a good deal of the argument at your Lordships' Bar, was upon a point which I confess seems to me immaterial for any question to be decided here, namely, whether this schedule, which on the face of it states that this testator's personal property was somewhere between £6000 and £7000 (the precise amount is unimportant), is to be considered as brought into the will or not. Upon that point, if it were material, I think it is clearly settled that, in order that it should be brought into the will and incorporated, it must be shewn that the document is referred to by the words of the will, and that it is not a document afterwards made, but a document then in existence. If it were necessary to decide that, which I do not think it really is, I should say that the evidence is not satisfactory here to shew that this schedule indorsed upon the will was in existence at the time when the testator executed, in the presence of witnesses, the will itself. If that be so, it cannot of course be looked at as a document referred to. If it were not so, and if it could be looked to, then by incorporating what was referred to, it would have been just as if the testator had said in terms, My personal property I consider to be between £6000 and £7000; but I consider that it would have left the construction of the will exactly the same as if he had said, I consider it to be between £16,000 and £17,000. I cannot see that it would have made the slightest difference in the construction of the will.

If it had been a material question for the construction of this will whether the property was large or was small, I should have thought that parol extraneous evidence might have been taken to shew what it was that the testator knew, or believed, to be the state of his property, and then if that was what Sir *James Wigram* in his treatise calls "evidence explanatory of the words," and shewing what was the intention of the words, it would have been relevant and material to be considered, but if it was merely what Sir *James Wigram* calls "evidence tending to prove intention as a fact," it would be quite irrelevant. Evidence as to what the testator knew would in this case be quite irrelevant to the question, which is, What does the will mean?

That being so, I need scarcely detain the House by repeating at much length that which I perfectly agree in, which has been

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

already said by both the noble and learned Lords who have addressed your Lordships. The heir-at-law of course takes the real estate, unless there is something in the will to shew an intention that it shall go to some one else, and the real question is, taking the whole will together, does it shew that the testator intended that this real estate should be converted into money for the purpose (shewing that intention on the face of it) that this money should go to the residuary legatee. It may be that the landed estate is turned into money merely for a useless caprice on the part of the testator, letting the heir-at-law take it, and giving it to nobody else. Here I think there is ample to shew that it was the intention of the testator to say that this land should be converted into money, and that the money, or rather the residue of the money after the debts and legacies had all been paid, should go to *Thomas Tomlinson*, whom he calls the residuary legatee. I do not think that any good would be gained by looking at the cases.

I quite agree with what has been said by both the noble and learned Lords who have preceded me, that the principle is clear that the intention is to be got at by attentively considering the words of the will itself, and that an intention is not to be assumed unless there is something which justifies us in saying that the will bears that meaning. With regard to the cases cited as having reference to wills of the same kind, *Kellett* v. *Kellett* (1) seemed at first a strong case, but when you come to see how Lord *Manners* in the Court of Chancery in *Ireland* (2), laid great stress upon the fact that the real property was not directed to be sold (3), which in the present case it is; when you observe how he puts the ground of his judgment (4), and when you come to see

(1) 3 Dow. 248.

(2) 1 Ball & B. 533.

(3) The important words were that various legacies were directed "to be raised and levied by my executors from my properties." Then came other legacies not accompanied by these words. Then came a new sentence: "The remainder of my property I devise to my executors to make good the above sums;" after which followed other legacies—then the appointment of three gentlemen "to be my executors to this my last will and testament, and guardians of the fortune of my children. And I also ordain, appoint, and devise the said three gentlemen executors to this my last will and testament also my residuary legatees, share and share alike."

(4) Lord *Manners* says the intention to disinherit must be plainly shewn,

what excessive doubt was expressed both by Lord *Eldon* and Lord *Redesdale*, both of whom adopted the rule of the Court thus stated, I think it is not too much to say that the decision in *Kellett* v. *Kellett* (1) gives no farther guide to a tribunal, than to say that if the will to be construed is in precisely the same words as in the case of *Kellett* v. *Kellett* (1) it should be construed in precisely the same way, but if it is not in precisely the same words you must see for yourselves what the testator's intention was, as who knows whether, if there had been the slightest difference in the words of the will, the doubts of Lord *Eldon* and Lord *Redesdale* might not have been changed into certainty the other way. The question is whether upon the whole will here, taking it altogether, there is not the intention apparent to convert the landed property for the purpose of paying the debts and legacies, and handing over the residue to *Thomas Tomlinson*. I think there is this, that if the testator had upon the face of this will said, "I believe my personalty to be £7000," and then on casting up the figures of the legacies you had found that they came to £13,000, or if the testator had said upon the face of the will "I believe my personalty to be £16,000," and then as we see had left legacies to the amount of £13,000, leaving the surplus over, I do not see that it would have affected the question at all. The testator shews an intention to turn the land into money out and out, he shews an intention that the residue, when the executors have paid the different things that they have to pay from the fund, should go to *Thomas Tomlinson;* that implies of necessity that the legacies should have been paid first in order to get the residue. If the legacies were more than the amount of the personalty he possessed, the object of the testator in turning the land into money must have been to benefit the legatees by letting them be paid in full. If the legacies were less than the amount of his personalty it would have been an idle and useless thing for the testator to turn

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not merely assumed as a matter of implication, and then observes of this will that it is "a will that in my view of the matter neither expresses nor implies an intention" of that kind; and goes on "if there be any doubt the title of the heir-at-law ought to prevail, that is the established rule of this Court, and upon that principle I think the heir-at-law entitled to a decree."

(1) 3 Dow. 248.

H. L. (I.) 1878 SINGLETON v. TOMLINSON.

his land into money, except it had been for the purpose of benefiting *Thomas Tomlinson*, the residuary legatee, to whom he gave the surplus of the fund. I therefore think that the question, whether there is much or little personalty, is quite immaterial, and upon the construction of the will I think it should be construed in the same way as the Court of Appeal below has construed it.

As to the question of costs, I quite agree that there is nothing to take this case out of the ordinary and accustomed rule.

LORD GORDON entirely concurred.

THE LORD CHANCELLOR:—

Your Lordships are not in the habit of discussing questions of costs at this stage. Upon the subject of the costs I submitted to your Lordships that of course if the Appellant had simply come here upon the question of construction, and had been unsuccessful, your Lordships would have dismissed the appeal with costs. It has happened that on a question which, although a question of costs, is still, under the circumstances existing here, a substantial one, and involves a question as to principle, your Lordships have come to the conclusion that the order of the Court below must in some respects be varied, and that circumstance according to your Lordships' view will exempt the Appellant from paying to the Respondent the costs of the appeal.

Order appealed from in part reversed, and in part affirmed, with variations.

The following Order was afterwards entered on the Journals (1):—

That the said order of the Court of Appeal in Chancery in *Ireland*, of the 9th of January, 1877, complained of in the said appeal, be, and the same is hereby varied by omitting therefrom after the words "so far as the same declares the," the following words, namely, "Defendant *William Henry Singleton* as heir-

(1) See the original Order to which these variations are applicable, *ante*, p. 407.

at-law and the," and also by omitting after the words "the testator directed to be sold," the following words, "the said personal estate and the proceeds of the real estate being constituted a mixed or blended fund in the hands of the executors to answer the purposes of the will generally," and by omitting after the words "And it is farther ordered, That the said," the words "Defendant *William Henry Singleton* and the said," and also by omitting after the words "and the said Defendants" the words "respectively other than," and inserting the word "including," and by inserting after the words "such costs to be taxed as executors' costs," the words "And that the Defendant *William Henry Singleton* is entitled to add his costs of appearing on this appeal to the costs ordered to be paid to him by the decree of the Vice-Chancellor," and by omitting after the words "Appellant *Thomas Tomlinson*" the words "and the said Defendant *William Henry Singleton*," and by omitting after the word "do" the word "respectively," and also by omitting after the word "abide" the word "their," and inserting the words "his": And it is farther ordered and adjudged, That the said order, subject to the above-mentioned variations, be, and the same is hereby affirmed: And it is farther ordered, That the cause be, and the same is hereby remitted back to the Chancery Division of the High Court of Justice in *Ireland* to do therein as shall be just, and consistent with these variations and this judgment.

Lords' Journals, 4th February, 1878.

Solicitors for Appellant: *Shoubridge & May.*
Solicitors for Respondent: *Hanly & Carlisle.*

Applied. MARRIAGE *v.* E. NORFOLK RIVERS, ETC. [1950] 1 K. B. 284

Principle enunciated by LORD BLACKBURN, at p. 455, *applied.* LONGHURST *v.* MET. WATER BOARD. [1948] 2 All E.R. 834.

[HOUSE OF LORDS.]

H. L. (I.) DAVID GEDDIS (PLAINTIFF BELOW) . . APPELLANT;

1878

AND

Feb. 12, 15, 18. PROPRIETORS OF THE BANN RESERVOIR (DEFENDANTS BELOW) . . . . . } RESPONDENTS.

Local Act—Persons incorporated—Powers and Duties—Negligence—Flowing Water.

4 QBD 444
6 App Cas 197

Where persons are incorporated by Act of Parliament for a particular purpose, and have full powers given them to effect that purpose, if the effecting of it may occasion (not only in the course of originally executing the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury.

Where the Legislature has authorized certain persons to effect a certain purpose, and has given them the powers necessary to effect it, they may exercise those powers to their full extent without incurring responsibility, but in so doing they must not occasion any needless injury to any one.

A local Act of Parliament incorporated certain persons for the purpose of securing a regular and proper supply of water to millowners whose works were situated on the banks of the River *B.* These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the *B.* through the channel of a stream called *M.* The 2nd clause of the Act directed them to "make, erect, construct, maintain, repair, and keep," by means of a reservoir, a due and adequate supply of water for the River *B.* at all seasons of the year—and to enter on the lands of the different streams named—to do what was necessary for the conveyance and due regulation of the supply of such waters, and "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels and watercourses, drains, feeders, weirs, dams," &c., &c. The 82nd clause gave similar directions, and ordered that the surplus water should be returned into the different streams from which it had been taken, and also made provisions for supplying with water the cattle depasturing in fields adjoining.

The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the *M.* to supply the *B.*, but, after a time, neglected to cleanse the channel of the *M.*, so that at times it overflowed its banks and did damage to the lands of the adjoining proprietors:—

Held, that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and

operations intended by the Act, should not be injurious to the lands lying along the banks of the *M.*, and that the bed or channel of the *M.* must be cleansed and kept in a proper state for the flow and reflow of the water that had to pass through it.

THIS was an appeal against a judgment of the Exchequer Chamber in *Ireland*, reversing a previous judgment of the Court of Queen's Bench there.

The Appellant had brought an action against the Respondents for damages occasioned to his lands by the floodings of water occurring in 1872, which, as he alleged, were the result of negligence on the part of the Respondents. There were several pleas (1).

(1) The first count alleged that the Defendants wrongfully caused divers large quantities of water to flow over and upon, and to be in and about a farm and lands of the Plaintiff at &c.

The second count stated that the Defendants were possessed of a reservoir at a place called *Lough Island Reavy*, for the storage of water, and were also possessed of a watercourse, to wit, the River *Muddock*, running by and in close proximity to, a close of the Plaintiff, &c., for conveying water from said reservoir; and so negligently, &c., managed the said reservoir, and the water therein, and the works in connection therewith, and the said watercourse, that water from the reservoir overflowed the Plaintiff's land, whereby the land was injured and the crops destroyed.

The third count set forth that before the time, &c., the Plaintiff was possessed of a farm and lands, and the Defendants were possessed of a watercourse, by the Defendants artificially constructed, and flowing by and past the farm and lands of the Plaintiff; and it alleged a duty on the Defendants to scour, cleanse, and keep free from obstruction, the bed and channel of the said watercourse, and, so often as was necessary, to prevent the water in the watercourse from being penned back, and impeded from flowing in and along the same, and to prevent it running out of the same into the Plaintiff's land; and also it was the duty of the Defendants to repair and make good the banks and sides of the said watercourse, and to prevent them from being undermined, &c., that they neglected their duty and did not cleanse and repair, &c., the bed and channel, and make good the banks, &c., of the watercourse as often as was necessary. And by reason of the premises the water was penned back and could not flow along the watercourse, but ran over the Plaintiff's land, whereby, &c.

The Defendants pleaded, first, a denial of the acts alleged.

Secondly, as to the first count, that the Defendants had done what they did under the Act 6 & 7 Will. 4, c. xcv., passed for the more regular supply of water to the River *Bann*; and the plea traversed negligence on the part of the Defendants.

As to the second count, they denied that they were possessed of the watercourse as alleged.

As to the third count, they denied that the watercourse was artificially

H. L. (I.)
1878
GEDDIS
v.
PROPRIETORS OF BANN RESERVOIR.

Issues on all the pleas.

The cause was tried at the Summer Assizes at *Antrim*, 1874, before Mr. Justice *Fitzgerald*.

The Defendants were (under the name of the "*Bann Reservoir Company*") incorporated by the 6 & 7 Will. 4, c. xcv. (local and personal) for the purpose of applying a remedy to the inconveniences suffered by the manufacturers and bleachers of linen who carried on their business along the banks of the river called the *Upper Bann*, from a want of sufficient water at some seasons of the year supplied to the river. For this purpose they were authorized to construct a reservoir for impounding the water in rainy seasons and times of flood, and turn into it certain watercourses, streams, &c., and to convey and duly supply water from the reservoir to the *Bann* for the purposes above stated. The general powers given to the Defendants were contained in the 2nd clause of the Act, and were described in the following terms: The Defendants were "authorized and empowered to make, erect, construct, maintain, repair, and keep at or near *Lough Island Reavy*, the *Corbet Lough*, and the *Deers Meadow*, &c., one or more sufficient reservoir or reservoirs, as may by such company be deemed sufficient for the due and adequate supply of the said River *Bann* with water at all seasons of the year," and for the proper turning of the mills, &c.; and the Defendants were "authorized and empowered, by themselves, their deputies, agents, surveyors, contractors, officers, and servants, at all convenient times to enter into and upon the said *Lough Island Reavy*, *Corbet Lough*, and *Deers Meadow*, and the

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constructed—and that the damage was occasioned as was alleged. And for a farther plea to the third count, the Defendants said that the watercourse mentioned was the River *Muddock*, which alone ran by the lands of the Plaintiff, in the ancient channel of the said river, and was not artificially constructed, nor were the Defendants possessed thereof otherwise than that under the Act they were entitled to have the water pass without obstruction through such ancient channel; that the only part of the said river which was artificially constructed was situated higher up than the land of the Plaintiff; and that they did cleanse the part so artificially constructed, and that they did repair the banks, &c., of such portion as often as necessary.

And the Defendants averred that the alleged causes of action were those which arose solely in respect of acts under the said 6 & 7 Will. 4, c. xcv., and that they did not occur within two years of the commencement of the action.

rivers or streams in the said county of *Down* called or known as the *Bann*, *Muddock*, *Burren*, *Slievenalargy*, and *Knockgorm*, and the lands adjacent thereto respectively, or lying between the said River *Bann* and the said *Lough Island Reavy*, *Corbet Lough*, or *Deers Meadow*, or between the said *Lough Island Reavy* and the said several rivers or streams called or known as the *Muddock*, *Burren*, and *Slievenalargy Stream*, or between the said *Corbet Lough* and the said rivers or streams called the River *Bann* and *Knockgorm Stream*, or any of them, and to view, inspect, survey, and make maps or plans of the same, and in and upon such lands and hereditaments as shall have been acquired and paid for, or for which compensation or satisfaction shall have been given or made in pursuance of this Act, to raise and construct proper and substantial embankments for the making and constituting such reservoir or reservoirs, and to turn and divert into such reservoirs certain watercourses, rivers, and streams, or feeders, as hereinafter mentioned, and to convey the water from such reservoirs into the said River *Bann* for all or any of the purposes aforesaid, and for the conveyance and due regulation of the supply of water to be kept in the said reservoirs, or to be conveyed out of them into the said River *Bann* as aforesaid, and for the security of such reservoirs, to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep, proper and sufficient conduits, aqueducts, channels, watercourses, drains, feeders, weirs, dams, embankments, floodgates, sluices, hatches, locks, by-waters, spill-waters, and other works, and to erect and keep in repair suitable buildings for the accommodation of the said company, its officers and servants."

The 81st clause of the Act empowered the Respondents to divert the different streams named therein, and the flood and surplus water of the River *Burren*, and to apply them for the purposes of the Act.

The 82nd section, after giving powers with respect to certain waters of the *Knockgorm* stream, contained the following provisoes: "Provided always that a quantity of water not less than that which shall or may be so carried off and diverted into the said reservoirs, or either of them, from the Rivers *Muddock* and *Bann* as aforesaid, shall afterwards be returned into the present course or bed of the said rivers at some place farther down in the course

H. L. (I.) 1878

GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

thereof, and not more than two statute miles from the point or highest points of diversion thereof as aforesaid: Provided also, that so much water shall at all times be allowed to flow, remain, and be in the present course of the said River *Muddock*, and of the said streams called *Slievenalargy Stream* and *Knockgorm Stream*, as may be sufficient for the watering of the cattle depasturing in the fields adjoining thereto, and other agricultural purposes."

The Defendants contended that although they had power to transmit water from their reservoir by the channel of the *Muddock* to the *Bann*, they had none to enter, from time to time, any of the lands for the purpose of cleansing, widening, or repairing the bed or banks of the *Muddock* below the feeder, so as to prevent the water sent down from the reservoir from overflowing the adjoining lands, but that any person on whose lands they entered for any such purpose might treat them as trespassers.

The jurors found, in answer to questions specifically put to them, first, that the injury to the Plaintiff's crops was not occasioned by his own negligence; secondly, that the alterations made some time before in the channel of the *Muddock* were for the benefit of the Defendants.

Objections were taken by the Respondents' counsel; but finally the learned Judge directed a verdict for the Appellant; the damages were, by agreement, fixed at £25. The Defendants had leave to move. A rule was obtained to enter the verdict for the Respondents; it was argued and discharged. The case was taken on error to the Exchequer Chamber, which reversed the decision of the Queen's Bench and ordered a verdict to be entered for the Defendants (the Respondents) (1).

Mr. *C. Russell*, Q.C., and Mr. *George H. Gartlan* (of the Irish Bar), for the Appellant:—

The decision of the Court below relieves the Defendants from all responsibility for their acts, or even for their negligence, and exposes the Plaintiff to continual injury without remedy. The Defendants were constituted a company for a particular purpose, which was that of supplying the millowners on the banks of the *Bann* with the water necessary to carry on their works with

(1) Ir. Rep. 11 Com. Law, 160.

advantage. But the Legislature did not intend that that purpose was to be attained without any regard for the rights and interests of the landowners whose lands lay by the side of the *Muddock*, which was the channel through which the water was to be conveyed from the reservoir to the *Bann*. The Defendants were bound to perform their duty to the millowners with due regard to the rights of the landowners. The power conferred for the benefit of the former, carried with it a liability as to the others. In *Lawrence* v. *The Great Northern Railway Company* (1), the company not having used the powers granted to it by its Act of Parliament with proper care and caution, was held liable for the damage caused thereby. And the principle on which such cases must be decided had been clearly laid down by Lord *Ellenborough* in *Weld* v. *The Gas-light Company* (2), which declared that a company having under an Act of Parliament powers the execution of which might occasion mischief, was bound to take especial precautions against the mischief, and in default of doing so was responsible in damages. That principle had been applied in *The King* v. *Pease* (3), and also in *Jones* v. *The Festiniog Railway Company* (4), and was fully recognised in *Fletcher* v. *Rylands* (5).

Here, by their own Act, the Defendants had power to cleanse the river, and that power became, under the circumstances of the case, a duty. This very object of their own Act, that of regularly supplying the mills on the *Bann* with an adequate and proper amount of water, would be defeated if the *Muddock*, which was the channel to be used for that supply, was left in an unfit condition to pass the water in the required, and none but the required, quantities. The obligation was on the Respondents, not on the owners of lands lying along the banks of the *Muddock*; they had no power to interfere, but were wholly at the mercy of the Respondents, who had the complete control of the flow of water, and, under the rule stated in *Bagnall* v. *The London and North-Western Railway Company* (6), they were liable to make good damage from a flood which they, by ordinary care, might have prevented.

(1) 16 Q. B. 643.
(2) 1 Stark. 189.
(3) 4 B. & Ad. 30.
(4) Law Rep. 3 Q. B. 733.
(5) Law Rep. 1 Ex. 265; Ibid. 3 H. L. 330.
(6) 7 H. & N. 423; affirmed 1 H. & C. 544.

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

The principle now contended for was applied in *Williams* v. *Groucott* (1) even to individuals exercising their ordinary rights over their own property, but that principle acquired double force when powers for a certain general purpose were given to a body of individuals, which powers could not be exercised without danger to the rights of others.

Mr. *Southgate*, Q.C., and Mr. *Andrews*, Q.C. (of the Irish Bar) (Mr. *Lewin* was with them), for the Respondents:—

The answer to this claim is, that all that has been done here has been done under the authority and in pursuance of the Act of Parliament. The consequences of what has been so done must be borne by the Appellants. That was the principle which was acted on in *The Hammersmith Railway Company* v. *Brand* (2). There was no pretence here for saying that the Defendants had exceeded the powers conferred on them, or had acted negligently in the exercise of those powers. In the *Parrett Navigation Company* v. *Robins* (3), certain persons had been incorporated for the purpose of improving the navigation of the River *Parrett*, as to which also they were authorized to take tolls for the conveyance of goods thereon. They performed the duty, and did improve the navigation, and damage from the works having occurred to some of the adjoining lands, it was held that, in the absence of any express enactment on the subject in the Act which incorporated them and declared their duties, they were not liable for the sewerage of the river, nor bound to clear away weeds, which, though injurious to the adjoining lands, were no detriment to the navigation. Exactly the same doctrine was followed in *Cracknell* v. *The Mayor and Corporation of Thetford* (4), where the Defendants were empowered by a private Act of Parliament to make navigable the River *Brandon*, and to take tolls for its navigation. They erected certain staunches for improving the navigation, but these staunches produced the effect of collecting the weeds and soil, so that the river overflowed its banks. There being no provision to compel or direct the Defendants to cut the weeds or dredge the accumulated silt, unless it was necessary to do so for the purposes of the navi-

(1) 4 Best & S. 149.
(2) Law Rep. 4 H. L. 171.
(3) 10 M. & W. 593.
(4) Law Rep. 4 C. P. 629.

gation, they were held not liable to an action for damage occasioned by the water overflowing, though it really arose from that accumulation. Here the Defendants had done all that the Act empowered them to do—they had no power to enter the lands of the riparian proprietors for the purpose of cleansing the bed of the *Muddock*, and they were not to be made liable for damage which arose from the execution of the works authorized by their Act, and with the cause of which damage they were neither directed, nor even empowered, to interfere.

The Respondents here only possessed an easement in the bed of the *Muddock*, an easement granted only for a particular purpose. That purpose they had fulfilled—they had no power beyond that, and consequently were under no liability beyond it: *Gale* on Easements (1). The Respondents could not justify trespassing on the lands of the owners: *Taylor* v. *Whitehead* (2). The injury here complained of was one not caused by the conduct of the Respondents, and the Courts in *Ireland* had, after mature deliberation, determined that, in a case like this, where the damage arose without negligence, from the very nature of the work to be done, liability did not arise: *Boughton* v. *The Midland Great Western Railway Company of Ireland* (3). There, certain persons had statutory powers to manage a canal for the purposes of improving the navigation of it; in the exercise of those powers injury happened to the Plaintiff's property, but that not being the consequence of any actual negligence on their part they were held not to be liable, as what they had done had been done for the very purposes authorized by the Act.

Mr. *C. Russell* replied, insisting that the clauses did give the power, and therefore implied the duty, to keep the bed of the *Muddock* clear and free for the proper flow of the water.

LORD HATHERLEY:— 1878
Feb. 18.

My Lords, I feel that your Lordships have been greatly assisted in this case by the very able arguments of the counsel on both sides; but the point itself is clear, and after the numerous deci-

(1) 5th Ed. p. 545. (2) 2 Doug. 745.
(3) Ir. Rep. 7 Com. Law, 169.

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

sions which have taken place may be considered as reduced to a very narrow compass. We must look carefully not into all the individual cases, but into the class of decided cases turning upon the point whether or not a company, authorized by Act of Parliament to execute a work that in its operations may do damage to others, has exceeded the powers it possessed, or whether the company has negligently exercised those powers which had been granted to it. The case which seems to have most affected the minds of the learned Judges in the Court below is the case of *Cracknell* v. *The Corporation of Thetford* (1). If a company, in the position of the Defendants there, has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

My Lords, I say the proper mode of executing those powers, because it appears to me that it is very neatly and appositely put by Mr. Baron *Fitzgerald*, in giving his judgment in the Court of Exchequer Chamber, in this form. Mr. Baron *Fitzgerald* says, "The substantial question raised on the pleadings to the first and second counts of the declaration, appears to me to be whether these acts of the Defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence."

Now, my Lords, the case stands thus. It was necessary, as the Legislature supposed, and we must deem it to have been so, for the proper carrying on of manufacturing works on the River *Bann* that there should be a more abundant and a more constant supply of water than those manufacturers possessed, and therefore, in the year 1836, an Act was passed for the purpose of providing such supply. The Legislature conceived that the formation of a large

(1) Law Rep. 4 C. P. 629.

reservoir was desirable, from which, from time to time, as they might be wanted, the required supplies of water could be sent, which should have the effect both of augmenting the supply and also of regulating the periods of the supply. That reservoir was to be formed at a certain height above the level of the River *Bann*. Parliament thought that the persons who should be empowered to purchase land for the making of this reservoir should also have power to divert into it certain streams and brooks, of which three are specifically mentioned, that those streams or brooks having been so diverted into the reservoir, their waters should be again conveyed by other means (which I must presently refer to) into the River *Bann*. Of those three rivers one was the River *Muddock*, another the *Slievenalargy*, and the third was called the *Burren*. Now, anterior to this operation, the reservoir which was to be formed at *Lough Island Reavy* did not, as I understand it, receive the waters of the *Muddock*, and, I think, did not receive the waters of the *Burren*. Therefore, if any waters from the *Muddock* or the *Burren* were brought into this reservoir they would augment the waters in the reservoir in proportion as they were introduced into it, and those waters being so augmented and increased in volume, the Commissioners were directed to do this: They were authorized by the 2nd section to make use of the River *Muddock* for the purpose of supplying the reservoir, but they were placed by the 82nd section under the necessity, by an express provision of the Act, of carrying back into the River *Muddock* at least as much water as they should have abstracted from it. There was no maximum limit, and therefore nothing to prevent their sending down as much more water as they liked, but at least as much water was to be sent down into the River *Bann* as they had abstracted from the *Muddock* in order to bring it into the reservoir at *Lough Island Reavy*.

My Lords, the course taken by the corporators was this, and it appears to have been a compliance with the Act of Parliament. They introduced the waters of the *Muddock* into the reservoir, and then in order to get an equal quantity out of the reservoir, so as to pour back the supply taken from the River *Muddock* into the River *Bann*, they had to make what has been called by the counsel an artificial link or cut, which link or cut would proceed

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

from the reservoir to the main stream of the *Muddock*, and would thus carry the quantity of water they were bound to supply back again to the River *Bann*. They did, therefore, supply that quantity of water, which they had taken through the medium of the *Muddock*, back to the *Bann* by means of an artificial channel, and they had the opportunity, when that artificial channel or cut was made, of pouring down as much more water as they might possess in the reservoir, there being nothing to prevent their doing so; they could send it into the *Bann* by means of this medium of communication between the reservoir and the River *Bann*.

Now, my Lords, the corporators having made an artificial link, they, whether rightly or wrongly, made use of the channel of the *Muddock* as it existed, to receive the waters coming from the reservoir through the medium of the artificial aqueduct or link. In that way the waters went from the reservoir down the *Muddock*, back into the River *Bann*. After they had made the artificial link they used the *Muddock*, in fact, in such a manner as they thought proper for the purpose of conveying the water to the *Bann*. In so using the *Muddock* there is evidence before us shewing that they did in point of fact (I am not now applying this to the third count in the action), not far from the particular farm which belongs to the Plaintiff in the cause, make cuts which widened the river, which river appears to have been of extremely narrow dimensions—so narrow in parts as to be what we should scarcely call by the name of a river—only four, five, or six feet wide, I believe. They widened it at one part, so that instead of being about five feet wide, it became sixteen or seventeen feet wide. Then what happened was this: whereas in its ordinary course, independently of its being so widened, the river was usually but scantily supplied in summer, being in fact in times of drought almost absolutely dry, there were only little pools of water from place to place along its course. The operation of the corporators through the medium of their reservoir was this: in order to supply the River *Bann* with such water as they thought necessary to supply it with, with regularity from time to time in seasons of the year when it had been somewhat below its ordinary level, in the summer season in particular, they poured down such a supply that the water overflowed the banks of the *Muddock*, and overflowing the

banks of the *Muddock*, came into the adjacent fields, and among others, on to the fields occupied by the Plaintiff, and destroyed his oat crops, and others which he specified, doing damage to the amount of £25.

The Plaintiff has brought his action, therefore, against the Defendants for this damage, averring in his summons and plaint:— [His Lordship here stated the counts in the action, see *ante*, p. 431.]

It is in evidence in this case that the water did in fact flow over the Plaintiff's land, and did in fact damage it as I have described. It is farther in evidence that that was due to the additional quantity of water which had been poured down by the Defendants from their reservoir. The bed of the *Muddock* was, for what reason we shall presently inquire, insufficient to receive and carry off this additional quantity of water, and therefore, not having sufficient channel through which to flow, the water was compelled to flow, and did flow (for that is in evidence), over some little amount of artificial banking which had been placed by the water's side, and did the damage which I have described. The cause undoubtedly was the supply of water in those unusual quantities beyond the quantities which had before been naturally accustomed to flow through the river. The effect of changing and varying the supply from time to time was, as the evidence shews, to undermine the banks and to throw down a portion of the banks from the side of the river into the bed and body of the river, thereby to raise up the bed and body of the river, and so to cause an overflow by means of an operation which could be distinctly traced to the Defendants' reservoir. This silting up and partial closing up of the bed or channel of the river had the effect of injuring the Plaintiff's land and crops, in a manner and to an amount that had never before occurred, and this was done by the Defendants in the carrying on of their operations.

It was said this morning that there was a lack of evidence as to what was the state of things anterior to the formation of the works by the corporators. I think, however, that that is entirely met by the evidence of a witness named *Savage*, and of Mr. *Neville*, and also by this circumstance, that on three separate occasions since the commencement of the works the river was cleansed and placed

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

in such a condition as to carry off the water sent down from above; and then the witnesses say there was no reason to complain for the next few years, and no damage occurred, because the watercourse had been, as the Plaintiff contends it ought always to have been, properly cleansed and made fit and proper for carrying off the water sent down from the reservoir into the river *Bann*.

My Lords, that being so, I take it that the facts of the case are proved. The verdict of the jury, so far as these matters of fact are concerned, has been to the effect that this water has not been carried off in consequence of the state of the river bed through which it had to be directed, when it was conveyed back to the *Bann* from the reservoir up above. That finding of the jury appears to me perfectly to correspond with, and to be supported by, the evidence which has been given in the cause. I refer to the two witnesses I have particularly mentioned; but there were several others to the same effect. *Savage* speaks more particularly to the previous state of things, and Mr. *Neville* speaks to the existing state of things, as an engineer, and refers to the two matters I have referred to, namely the silting up of the river and the peculiar mode of supplying the water as producing that silting up.

Now the argument of the Plaintiff has been this. He says, either there is an obligation cast upon you under the express words of the Act that you should keep this river, the *Muddock*, cleansed and scoured and fitted for the transmission of the additional water, or, if there is no such direct mandatory portion of the Act requiring you distinctly so to do, at all events you have power given you to carry into effect the operations which you are authorized by the Act to perform, and therefore you have the power of remedying the grievance which I have complained of; and that being so, the maxim applies, *sic utere tuo ut meum, non lædas*. Therefore, the Plaintiff says, I will undertake to shew that there is in the Act of Parliament a distinct power of keeping this River *Muddock* in such a state as to allow the additional water to pass through it. And, that power existing, he says that the Defendants ought to be compelled to execute their work and carry on their operations in such a way as not to be unnecessarily injurious to him, the Plaintiff. As to the question of power, it appears to me that there cannot be any doubt, when we come to read the several sections to which we

have been referred. The Act is extremely inartificially framed; still I think there is enough in its different clauses to enable us to understand the mind and intent of the Legislature in enacting the different provisions which have been referred to.

My Lords, the Act recites in the preamble the importance of the linen manufactures and the works for the bleaching of linen which have been for many years carried on in the River *Bann*, and that "great inconvenience has been felt by persons engaged in that trade from the scanty supply of water in the river at certain seasons of the year, wholly inadequate at such times to the propelling of the machinery;" and then that this inconvenience might be removed by the construction of a proper reservoir for impounding the water in times of flood, to be at other times supplied and conveyed to this river. It proceeds by the second section to authorize and empower the Respondents:—[His Lordship read the section, see *ante*, p. 432.]

After providing for other things, the Respondents are (and these words are very important), "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels, watercourses, drains, feeders, weirs, dams, embankments, flood-gates, sluices, hatches, locks, bye-waters, spill-waters, and other works, and to erect and keep in repair suitable buildings."

My Lords, before construing the 2nd section I will refer for a moment to the 3rd. The 3rd section refers, in the ordinary way of Acts of Parliament of that time, to plans and sections which describe the lands which may be taken for the purposes of the Act. Those plans and sections represent the lough which was to form the reservoir, power being given to purchase land for the purpose, and then the plans and sections also describe and exhibit the place where there was to be made, and where there has since been made, an artificial cut or channel between the River *Muddock* and the reservoir into which the water of the *Muddock* was to be introduced. And then, through the medium of another artificial cut, the same amount of water was to be supplied and carried into the River *Bann*; that cut is also represented upon the map, but the whole course of the river *Muddock* is not represented, and the whole course of the river *Bann* is not represented. I mention that because something was

H. L. (I.) 1878 — GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

said about the absence of plans and sections, and the absence of a power of entering upon the river and cleansing it under any clause contained in the Act.

Now the question really comes to this, whether or not these last words in the 2nd section, "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels, watercourses, drains," and so on, do or do not include this portion of the *Muddock* where the Plaintiff's land which has been damaged is situated. The Respondents have taken upon themselves to make use of the River *Muddock* itself for conveying back to the *Bann* the water which they had taken from it. They have made use of the river *Muddock* itself, so far at least as to make an artificial cut from the reservoir joining itself on to the River *Muddock*, and the waters are returned to the River *Bann* through the medium of the artificial cut and the *Muddock*. Therefore the water is supplied from time to time to the River *Bann* in the manner intended and provided for by the Act, namely, as a regular supply in accordance with the necessities of the season, for the supply is to be given when the season would naturally leave the watercourse comparatively dry, and it is withheld when more water would not be required for the purposes of any of the works connected with the *Bann*.

I cannot understand, my Lords, how it could be argued that in that state of things, this artificial cut being made, and this cut being used as the mode of conveyance of water to the River *Bann*, and as the mode of supplying the River *Bann* with water, the whole object being to supply the River *Bann* with water, this stream—the *Muddock*—is not to be deemed to fall within the words I have read, namely, "aqueducts, channels, watercourses, drains," and so on. Undoubtedly the first portion of the communication, that is to say the artificial link, as it has been called, must, according to the clearest and plainest meaning of the words, be an "aqueduct" or a "channel." But why in the world the company should not be able to make use of the River *Muddock* as a "channel" or watercourse, when it would be the best mode of carrying out the operations, I cannot conceive. It does not appear to me that anything in the prior part of the clause, which speaks of making an artificial cut and a reservoir, and draining into it certain water-

courses and rivers and streams or feeders, at all displaces the force of the observation that it is necessary to have some mode or other of properly conveying the water by a watercourse, and that if necessary the Defendants should be able to make use of that watercourse which they found most convenient.

The clause says, "To make, erect, alter, maintain, repair" the channels or watercourses. Much stress was laid upon the words "make and erect," as contemplating new works and being more appropriate to new works, and so they perhaps may be. But it is not only the *making* and *erecting*, which is referred to in the clause; the Defendants are to "alter, maintain, repair, widen, deepen" channels or watercourses. They found it desirable to widen this watercourse and they found it desirable to deepen it, accordingly they did widen it and they did deepen it, and having so widened and deepened it they are empowered (I am only using the word "empowered" at present) to "cleanse" it and to "keep it proper and sufficient" for its purpose.

Well, my Lords, if they have this power of cleansing it and making it proper and sufficient, the question is, while so using it as they have chosen to use it for conveying water into the River *Bann* in the regular and constant supply which is thought desirable by the Act—whether, so using it, they are or are not bound to make reasonable use of all the powers which they possess, to do the work in such a manner as shall be effective without damaging the property of any others whose property they may come into contact with in the course of their user of this particular channel which they have adopted. It appears to me that when so stated the case becomes really clear of all the authorities which have been cited, and the proposition is brought back simply to that which is stated, as I have already said, by Mr. Baron *Fitzgerald*, namely, whether or not they have so exercised these powers as to avoid negligently doing injury to others, and whether the case is not taken out of the principle laid down in *Cracknell* v. *The Corporation of Thetford* (1) and other cases cited in the course of the argument as authorities against the present contention of the Appellant.

I ought to notice that it does not rest wholly upon this 2nd

(1) Law Rep. 4 C. P. 629.

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

section, but I must call your Lordships' attention to the 82nd section, which refers to this particular river, the River *Muddock*. The 81st section, immediately preceding the one I am about to refer to, says, "That in order to provide a due and sufficient supply of water in the reservoirs to be constructed under this Act, and for the purposes thereof, it is expedient that the said company should be empowered to divert into the reservoir to be constructed at or near to *Lough Island Reavy* as aforesaid, the waters of the River *Muddock* and of *Slievenalargy Stream* and the surplus water of the *Burren* river aforesaid and to divert into the reservoir" at *Corbet Lough*, the water of the *Knockgorm Stream*, "and the surplus or flood waters of the said River *Bann*, and to cause all the said rivers and streams to flow in manner hereinafter mentioned;" there it is enacted that "it shall and may be lawful for the company by one or more good and sufficient conduits or aqueducts, and which conduits or aqueducts being at all times furnished with proper flood gates and sluices shall communicate and join with the present course of the River *Muddock*" "to divert and carry off into any reservoir which may hereafter be constructed under this Act, at or near to *Lough Island Reavy*, all or so much of the water of the River *Muddock* as to the company shall seem right, and that it shall also be lawful for the said company" "to turn, divert, and carry off into" the reservoir all or so much of the water of the *Slievenalargy Stream* as they shall think right, and then the same with regard to the River *Burren*.

That being provided, the 82nd section says it shall be lawful for the Respondents "by one or more good and sufficient conduits or aqueducts furnished as aforesaid, to turn, divert, and carry off into any reservoir which may hereafter be constructed under this Act, at or near to the *Corbet Lough*, all or so much of the water of *Knockgorm Stream* as to the said company shall seem right; and that it shall also be lawful for the said company in manner aforesaid to turn, divert, and carry off into the said last mentioned reservoir, and from such part of the said River *Bann* above the weir now occupied by *Samuel Ervin* and *David Dixon*, or one of them, as to the said company shall seem right, so much of the water thereof as shall flow into and along a channel or aqueduct of any convenient width." Then there is this provision: "Provided

always, that a quantity of water not less than that which shall or may be so carried off and diverted into the said reservoirs, or either of them, from the Rivers *Muddock* and *Bann* as aforesaid, shall afterwards be returned into the present course or bed of the said rivers respectively, at some place farther down in the course thereof, and not more than two statute miles from the point or highest points of diversion thereof as aforesaid: provided also, that so much water shall at all times be allowed to flow, remain, and be in the present course of the said River *Muddock*, and of the said streams called *Slievenalargy Stream* and *Knockgorm* stream, as may be sufficient for the watering of the cattle depasturing in the fields adjoining thereto, and other agricultural purposes."

That, my Lords, shews the course intended by the Legislature to be taken by the Respondents, that they should have full power of bringing this water into the lough, and that they should have the duty imposed on them of sending back at least as much as they take. There being nothing to prevent their sending down as much more as they think proper, and they having the express injunction laid upon them to make a communication between the lough and the *Muddock* for the purpose of restoring to the *Muddock* that which they have taken from it, it follows plainly that they would have the power of making use of the *Muddock* as the aqueduct or watercourse through which the water may be conveyed to the *Bann;* and having power so to make use of it, they would have the power to scour and cleanse it from time to time; and if they have the power of so cleansing it, it appears to me, my Lords, that a person who is injured by their introducing the water in the manner in which it has been introduced, that is to say, not by a natural flow, and at such times and in such quantities as it had been accustomed to come down the *Muddock*, but in the quantities and at the times required, in order to carry out the duties imposed upon them by the Act of Parliament, were bound to keep clear the channel they had so provided and used in order that they might not, by reason of the additional amount and quantity of water they so sent down, and by reason of the mode and times in which they sent it down, occasion the damage which has been occasioned to the Plaintiff.

H. L. (I.) 1878

GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

Though the 87th and 88th clauses were referred to in argument I do not think that there is any necessity to dwell upon them here.

I rely upon this as distinguishing the present case from the several cases which have been cited before us, and particularly the case of *Cracknell* v. *The Mayor and Corporation of Thetford* (1). In that case, which has been followed by several others, it seems to have been laid down that persons having powers to execute certain works, and executing those works in such a manner as to perform that duty in compliance with an Act of Parliament, and being utterly guiltless of any negligence, cannot be liable to an action. If the person injuriously affected cannot find any clause in the Act of Parliament, giving him compensation for the damage which he has received, he cannot obtain compensation for that damage by way of action against the parties who have done no wrong. That is the simple proposition which is laid down in that case, and when it is expressed in those terms it is impossible for anybody to find any fault with it. As my noble and learned friend (Lord *Selborne*) has observed, there are other cases far more like this case than that of the corporation of *Thetford*.

In the *Thetford Case* (1) what occurred was this; there was a power to a company to facilitate the navigation of a river by means of making certain alterations and improvements in it; a part of the necessary alterations was the placing of stanchions in the river; when the river was so altered and improved weeds grew up in it with which the company had nothing to do; they grew up neither more nor less by reason of anything that the company had done. It was said that the silting of the river had been increased by means of those stanchions, but they were necessary to the work and could not be removed; but nothing had been of its own accord done by the company which could be said to be the cause of the injury the Plaintiff had sustained. Now in this case we have this state of things. The Respondents have the power to execute a work of this description, and to make channels and cuts, and not only so, but they have also the power to widen and deepen cuts and water-courses. Having that power, and having the power of using those watercourses to communicate between the reservoir and the River

(1) Law Rep. 4 C. P. 629.

Bann, they have chosen to exercise that power in a manner injurious to the Plaintiff owing to their not having seen, in the first instance, the necessity of making provision for the additional quantities of water that would be sent down, and at the varying periods at which they would be sent down. The Defendants neglected to make the provision they should have made for carrying that water off in such a manner as would have prevented the occurrence, to the Plaintiff, of a damage which never had occurred to him before, and which was, as the jury found, attributable to the works so executed. This case is not within the principle of the *Thetford Case* (1), nor within any principle which could be laid down with regard to parties keeping themselves entirely within their powers, and taking care that the powers of an Act of Parliament, when exercised, shall be exercised in a manner to prevent needless injury. We are not bound, nor entitled, to suppose that they will wilfully do injury by the exercise of the legislative powers which have been given to them; but it appears to me clearly and plainly that they should use every precaution, by the exercise either of their powers created by the Act of Parliament itself, or of their common law powers, to prevent damage and injury being done to others through whose property the works or operations are to be carried on, and to avoid subjecting them to consequences which they were not bound to anticipate from the Act of Parliament, seeing that the Act also enabled the parties who had the power to do so, to prevent the mischief.

It was stated at the Bar that if we came to the conclusion that the decision of the Court of Exchequer Chamber was right, the Defendants might prevent or destroy the growing of any crops whatever upon the land in question, which of course would be very serious to the Plaintiff. But we cannot assume such a result. The evidence shews that some repairs were, some years ago, carried out in this small river giving satisfaction to the landowners, and that the satisfaction lasted for a few years in consequence of the alterations which were made, which fortunately seem to have cost only between £100 and £200. It is satisfactory to hear that, for a suggestion was made by counsel, that the detriment imposed upon the Defendants by this liability to scour the *Muddock*

(1) Law Rep. 4 C. P. 629.

H. L. (I.) 1878 ~~ GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

would be fearfully augmented by applying the like process of reasoning to the *Bann*, that the Defendants would be subjected to farther expense and inconvenience. It would not perhaps be in all respects to be deprecated even if the like reasons should be so applied, but it is quite clear that upon the River *Bann* the same argument would not have the same force or application, because that is the ultimate terminus to which all the water is to be conveyed. If it is the ultimate terminus to which all the water is to be conveyed, that is the very object and intent of the Act of Parliament, and that object is to be carried into effect; but, in carrying it into effect, where the means exist of providing against injurious consequences to others, I apprehend, that the true construction of all such powers given to companies is this: You *may* carry out your work to its full extent, and in some cases you *must* carry it out to its fullest extent, in the manner provided by the Act, but in so doing you shall not create any needless injury—you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you, the law will say that the powers which you can exercise shall be exercised for the prevention of mischief.

My Lords, I recommend to your Lordships that the decision of the Court of Exchequer Chamber in *Ireland* be reversed. That will consequently restore the judgment of the Court of Queen's Bench; if so, all that will be necessary will be simply to reverse the order of the Court of Exchequer Chamber. With regard to the costs of the appeal, I should propose to your Lordships to follow the course which has been adopted lately, namely, that the party who has succeeded here should be entitled to add his costs of the appeal to the Court below to his costs here.

LORD SELBORNE:—

My Lords, it is admitted that if the Defendants are under an obligation to maintain the bed of the River *Muddock* as a proper watercourse for the conveyance of the water from their reservoir to the River *Bann* without unnecessary damage to adjoining proprietors, or (what is the same thing) to abstain from sending down water to the damage of the adjoining lands by the River *Muddock*,

which that river, in its actual state, is not capable of properly conveying to the *Bann*, the Plaintiff must succeed in this action. I am of opinion that the Defendants are under such an obligation.

The material facts are these: The object of the statutory powers given to the Defendants was to provide proper reservoirs for the impounding of water in times of flood and rainy seasons "to be supplied and conveyed to the River *Bann*" for the purpose of making the waters of that river adequate at all seasons to propel the machinery used for the purposes of the linen manufacture and bleaching trade on its banks. It was thus of the essence of the undertaking that the new supply of water should be properly conveyed, not to the River *Muddock*, but to the River *Bann*. By the deposited plans and sections referred to in the 3rd section of the Act it appears that the lands, which power was taken compulsorily to purchase, included the site of the reservoir in question, and all or some of its feeders, and also the outlet from it, down to the junction of that outlet with the River *Muddock*, but that they did not extend to the bed of the River *Muddock* itself, nor to any other lands through or over which any water of the reservoir could be conveyed to the river *Bann*. Upon these plans and sections it must certainly be taken that the scheme of the undertaking, as laid by the promoters before the Legislature and sanctioned by the Act of Parliament, was that the watercourse of the River *Muddock*, from the point at which it received the water flowing in by the outlet from the reservoir, was intended to be used for the conveyance of the water stored up in the reservoir to the River *Bann;* and this is confirmed by the proviso in sect. 82, requiring a quantity of water to be returned into "the present course or bed of the River *Muddock*," "not less" than that which might have been diverted from its upper course into the reservoir; and, still more, by the highly penal enactment in the 104th section against those, not only who might do wilful damage to any reservoir, &c., or other work to be made or erected by virtue of the Act, but also "to any bank or side of the River *Muddock* below the point at which the water flowing from the reservoir at *Lough Island Reavy* shall be returned into the said river."

Upon these facts it seems to me that the object of the Legis-

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

lature would not be sufficiently provided for and accomplished, if (assuming the existing watercourse of the *Muddock* to be, in fact, used by the Defendants for the conveyance of the water from their reservoir to the River *Bann*) the Defendants had no power conferred upon them to alter, deepen, widen, or otherwise improve that watercourse, so far as might be necessary or proper for the conveyance into the River *Bann* of a proper supply of water for the purposes of the Act, and afterwards from time to time cleanse and scour its bed and maintain and repair its banks, so far as those operations might be necessary for the same purpose. It would be strange indeed if (for the protection of the Defendants' undertaking) the offence of wilfully breaking down the banks of the *Muddock* were constituted a felony, and yet at the same time no powers were given to the Defendants to repair those banks, and no obligation cast upon any one else to do so. The majority of the Judges in the Court below appear, however, to have been of opinion that no such power was in fact given by this Act to the Defendants; and if they had not been of that opinion I see no reason to suppose that they might not have agreed with Chief Baron *Palles* and Baron *Fitzgerald*, and with the Court of Queen's Bench. The question must of course be decided, not on any *à priori* assumption, but on the very words of the Act; but if the words of the Act will admit of either construction, that (certainly) ought to be preferred which is the more probable and reasonable, having regard to the purposes of the Act.

Farther, it appears to me to be clear that if, by this Act of Parliament, power is given to the Defendants to convey by this particular channel to the River *Bann*, a supply of water which would not otherwise in the same manner naturally pass down that channel, and to do all things proper and necessary for the conveyance and regulation of such supply of water, that power does not enable or authorize them to flood the lands of the neighbouring proprietors, unless it would be impossible to avoid or prevent such flooding by any reasonable and proper use of their statutory powers. For this proposition I do not think it necessary to cite authority; but I may say that it appears to me to be consistent with all the authorities which have been referred to, and to rest upon very evident grounds of reason, justice, and law.

Coming then to the consideration of the 2nd section of the Act, upon which the whole question depends, I find there, in the first place, a power given to the Defendants "at all convenient times to enter into and upon" (*inter alia*) "the River *Muddock* and the lands adjacent thereto;" and this power does not appear to me to be limited with respect to the River *Muddock* (as it certainly is not with respect to some of the subjects mentioned in the same context) by the superadded power which follows, "*and* to view, inspect, survey, and make maps or plans of the same." Looking to the general structure of the section, there is no grammatical necessity, or even reason, for so limiting the power of entry; and, looking to the reason of the thing, it ought not to be so limited, if there are other purposes of the Act for which such power of entry might be proper and useful.

I next find that the only works expressly contemplated by this section as works to be constructed or executed on lands to be *purchased* by the Defendants under the powers of the Act, are the reservoirs themselves. The means of conveying the water from those reservoirs to the *Bann* are (as it would seem) assumed to be provided for by the power of entry and the subsequent powers; which are (*inter alia*) "to convey the water from the reservoirs into the said River *Bann*" (not into the *Muddock*) and "for the conveyance and due regulation of the supply of water to be conveyed out of the reservoirs into the River *Bann* as aforesaid, to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep, proper and sufficient conduits, aqueducts, channels, watercourses, &c., and other works."

The Defendants say, that the words "alter, maintain, repair, deepen, scour, cleanse, and keep" ought all of them to be restrained (by the force of the preceding word "make") to works constructed and made *de novo* by themselves; and that in the event of the River *Muddock* being used (as it has been and as it was contemplated by the Act that it would be used) for the conveyance of the water of this reservoir to the *Bann*, they do not apply to that watercourse. But why should they be so limited? No such limitation is grammatically necessary; and it would, in my opinion, be arbitrary, improper, and unreasonable, having regard to the objects and purposes of the Act. By the 59th section ample pro-

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

vision is made for compensation to the owner of, and all persons interested in, all lands, tenements, and hereditaments, which may be damaged or injuriously affected by the execution of any of the powers of the Act; so that, if any person should suffer damage from any operations of the Defendants in altering, maintaining, repairing, deepening, scouring, or cleansing the bed or banks of the River *Muddock*, while it is *de facto* used under the Act as a watercourse by which the supply of water is conveyed out of this reservoir into the River *Bann*, full justice will be done to him, in the manner usual when private property is interfered with by statutory authority for any public purpose. On the other hand, if the Defendants' argument were correct, the Legislature would have authorized a work from which, after it was executed and constructed, extensive damage of a kind not incident to or necessary for the undertaking might from time to time be done to the Plaintiff's, and to other private property, without conferring on the undertakers those powers (to say nothing of obligations) which were in reason necessary not only to prevent such damage, but also to secure the safety and success of the undertaking itself; and it would be at least doubtful (upon the same hypothesis) whether the persons so injured would have any case for compensation under the 59th section.

It appears to me that according to the true intent, and also according to the natural and reasonable construction of the very words of the statute, the Plaintiff is right; and that the judgment of the Court of Exchequer Chamber in *Ireland* ought to be reversed.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion.

The whole question in this case depends upon the construction of the Act of Parliament, which is very inartificially framed and very confusedly worded, so that it is not at all astonishing that there should be some difficulty in getting at its meaning, or that there should have been some difference of opinion in the Courts below as to what it did mean. But after the discussion which has taken place I find that the only difference of opinion in the Exchequer Chamber is confined to one small point—I mean small

in compass—namely, whether or not the promoters of this Act, that is to say, the persons now represented by the Respondents, have power under the Act to cleanse or widen, or deepen or scour that part of the River *Muddock* which lay below the point to which the waters of the reservoir were brought down, and where they were poured into the River *Muddock*. Upon that I will say a word or two afterwards; but at present I will point out to your Lordships that all are agreed that the effect of the Act is to make a reservoir of *Lough Island Reavy*, which was originally a small lake. The Respondents made that large reservoir by artificial works, and brought into it part of the waters of the River *Muddock* and a great quantity of other waters, partly from the River *Burren* and partly from other streams; and, that water being thus accumulated into the reservoir, they have under their Act made an artificial cut which brings it down to the River *Muddock* two miles below the place where the water was diverted from the River *Muddock*, and pour it in there.

It is agreed on all sides that the Act requires the promoters, the Defendants, to pour into the channel of the River *Muddock* as much water as, on the average, used formerly to go. It does not mean that if it happens to be a high flood they are to keep it up to a high flood, or that in summer they are to keep it to a mere trickle if it was a mere trickle before; but it means that on the average it is to be as much as it was before. And they have a permissive power, for the benefit of the millowners on the *Bann*, to send down more water, both greater in quantity and in a different way from what would have gone in the ordinary natural state of things down the *Muddock* if the Act had not been passed. Now, certainly the result has been that the channel of the *Muddock* as it exists at present is not able to carry off the water they have put into it, and if they have no power to cleanse the channel of the *Muddock*, or to alter it, which was the view taken by the majority of the learned Judges of the Court of Exchequer Chamber below, then they are not liable to damages for doing that which the Act of Parliament authorizes, namely, pouring part of the water of the reservoir into the *Muddock* that it may go to the *Bann*. For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized,

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.

Now, upon that view of the law, if in this case the learned Judges in the Exchequer Chamber are right in holding that the Defendants have no power to interfere with the channel of the *Muddock* at all, of course no action will lie against them. But if on the other hand Baron *Fitzgerald* and Chief Baron *Palles* are right in the view which they took, that they have power to do so, I think that the conclusion becomes irresistible that they ought to adopt a reasonable exercise of that power by cleansing, scouring, widening, and deepening, the natural channel of the *Muddock*, so as to make it capable of receiving the waters which they pour down it, and that not to do so before they poured down the water, was a neglect to make a reasonable use of the powers given to them by the statute.

The whole question therefore comes round to this: Was such a power given or was it not? I may say that I incline very much to agree with what I see was said by Mr. Justice *Lawson*, and what I think appears to be the opinion of all the Judges in the Exchequer Chamber, that the question whether or not this channel of the *Muddock* had been so worked upon as to be what is properly called an artificial channel, is really immaterial. If the Defendants had worked upon it and turned it into an artificial channel instead of leaving it as it was before, it would not have cast the obligation upon them, if they had not the power to cleanse and scour it, and if there is an obligation upon them by a reasonable use of their powers to put the channel into a proper state to receive the water they are pouring down, they are liable if they have not fulfilled that obligation. Therefore, I am much inclined to agree with them that that third count was irrelevant. However, the jurymen have found that for the Plaintiff, and to

alter that at all, if it were to be altered, would make a very small difference in the matter of costs, and it has not been urged as a question upon this appeal before your Lordships.

Then, my Lords, the matter comes round as it seems to me entirely to the question upon the true construction of the Act of Parliament and the power given by it. I think, when you see the different sections of the Act, it comes to be entirely a construction of the 2nd section. Do the powers there given to the company for the convenience and the due regulation of the supply of water to be kept in the reservoirs and conveyed out of them into the River *Bann*, and the powers "to make, erect, alter, maintain, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels, watercourses," and so forth—do those powers when properly construed extend to this, that they may deepen, cleanse, and widen (for those are the important words) the natural channel of the watercourse called the *Muddock*, into which they have poured their water, and which they have used as the means of conveying the water from the reservoir to the *Bann*. I think the words will fairly bear that meaning. I agree with what has been said already, that when we see that to give them that meaning will most effectually carry out the Act, and will do justice, whilst the other meaning, which does not seem to me to be a bit better and clearer, will not carry out the Act at all and will not do justice (for it will destroy the property of persons living alongside the River *Muddock* without giving them compensation). I think, when we see that, we ought to construe the Act in such a way as will carry out the Act, and at the same time do justice, and we ought therefore to say that the Defendants may "widen, deepen, scour, and cleanse," this watercourse, so as to be sufficient for the water carried into it. That being so it was negligence on their part not to do it, and not to do it to such a reasonable extent as to allow the water they brought into the *Muddock* to go down to the *Bann* without damaging the Plaintiff's farm. I hope that doing that will not occasion great expense to the Defendants; if it does I am sorry for it. What is apparently good ground has been given to us for believing that the expense to the Defendants in keeping the channel in a proper state will not be very heavy and severe; but whether it is heavy and severe

H. L. (I.) 1878 GEDDIS v. PROPRIETORS OF BANN RESERVOIR.

or not, I think, having the power to do it they were bound to do it before they sent the water down.

I consequently agree, my Lords, that the order of the Exchequer Chamber should be reversed, and the order of the Court of Queen's Bench restored.

LORD GORDON:—

My Lords, I am of the same opinion. After giving the fullest consideration to the arguments we have heard and to the opinions which have been delivered in the Court of Exchequer Chamber, I think that the judgment proposed by my noble and learned friend now on the woolsack should be adopted. I regret exceedingly that there should have been so much expense and discussion with reference to a matter of this kind. I think that the Defendants will probably find it their better course hereafter to undertake the cleansing of their river instead of having recourse to litigation.

The following Order was afterwards entered in the Journals:—

Ordered, That the Order of the Court of Exchequer Chamber in *Ireland*, of the 13th of June, 1876, be reversed; and that the Order of the Court of Queen's Bench in *Ireland*, of the 9th of June, 1875, be restored, with costs. And the cause was ordered to be remitted to the Queen's Bench Division in *Ireland*.

Lords' Journals, 18th February, 1878.

Solicitors for the Appellant: *Cruse & Clay.*
Solicitors for the Respondents: *Lewin & Co.*

[HOUSE OF LORDS.]

JAMES CUNDY AND T. BEVINGTON . . APPELLANTS; AND THOMAS LINDSAY AND OTHERS . . . . RESPONDENTS.

H. L. (E.) 1878 March 1-4.

Contract—Fraud.

The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title.

By a purchase in market overt the title obtained is good against all the world.

If not so purchased, though purchased *bonâ fide*, the title obtained may not be good against the real owner.

Where the original owner has parted with the chattel to *A.* upon a *de facto* contract, though there may be circumstances which enable that owner to set aside that contract, the *bonâ fide* purchaser from *A.* will obtain an indefeasible title.

The question, therefore, in many such cases will be, was there a contract between the original owner and the intermediate person.

L. was a manufacturer in *Ireland; Alfred Blenkarn*, who occupied a room in a house looking into *Wood Street, Cheapside*, wrote to *L.*, proposing a considerable purchase of *L.'s* goods, and in his letter used this address—"37, *Wood Street, Cheapside*," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be "*Blenkiron & Co.*" There was a respectable firm of that name, "*W. Blenkiron & Co*," carrying on business at 123, *Wood Street*. *L.* sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. *Blenkiron & Co.*, 37, *Wood Street*." The goods were received by *Blenkarn* at that place, and disposed of to the Defendants, who were entirely ignorant of the fraud:—

Held, that no contract was made with *Blenkarn*, that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to the Defendants, who were consequently liable to the Plaintiffs for the value of the goods.

APPEAL from a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench.

In 1873, one *Alfred Blenkarn* hired a room at a corner house in *Wood Street, Cheapside*—it had two side windows opening into *Wood Street*, but though the entrance was from *Little Love Lane* it was by him constantly described as 37, *Wood Street, Cheapside*. His agreement for this room was signed "*Alfred Blenkarn*." The

H. L. (E.) 1878 CUNDY v. LINDSAY.

now Respondents, Messrs. *Lindsay & Co.*, were linen manufacturers, carrying on business at *Belfast*. In the latter part of 1873, *Blenkarn* wrote to the Plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from "37, *Wood Street, Cheapside*," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into *Wood Street* on one side, could only be reached from the entrance in 5, *Little Love Lane*. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "*Blenkiron & Co.*" There was a highly respectable firm of *W. Blenkiron & Son*, carrying on business in *Wood Street*—but at number 123, *Wood Street*, and not at 37. Messrs. *Lindsay*, who knew the respectability of *Blenkiron & Son*, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. *Blenkiron & Co.*, 37, *Wood Street, Cheapside*," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. *Blenkarn* sold the goods, thus fraudulently obtained from Messrs. *Lindsay*, to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. *Cundy*, who were *bonâ fide* purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs. *Lindsay*, the junior partner of which firm, Mr. *Thompson*, made the ordinary affidavit of debt, as against *Alfred Blenkarn*, and therein named *Alfred Blenkarn* as the debtor. *Blenkarn's* fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced. Messrs. *Lindsay* then brought an action against Messrs. *Cundy* as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice *Blackburn*, who left it to the jury to consider whether *Alfred Blenkarn*, with a fraudulent intent to induce the Plaintiffs to give him the credit belonging to the good character of *Blenkiron & Co.*, wrote the letters, and by fraud induced the Plaintiffs to send the goods to 37, *Wood Street*—were they the same goods as those bought by the Defendants—and did the Plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt *Alfred Blenkarn* as

their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the Defendants, with leave reserved to move to enter the verdict for the Plaintiffs. On motion accordingly, the Court, after argument, ordered the rule for entering judgment for the Plaintiffs to be discharged, and directed judgment to be entered for the Defendants (1). On appeal, this decision was reversed and judgment ordered to be entered for the Plaintiffs, Messrs. *Lindsay* (2). This appeal was then brought.

The Solicitor General (Sir *H. S. Giffard*) and Mr. *Benjamin*, Q.C. (Mr. *B. Francis Williams* was with them), for the Appellants :—

The question here is, whether the property in the goods passed from the Respondents to *Blenkarn*. It is submitted that it did (3).

A title to goods may be acquired even where they are obtained upon false pretences. Though it will not be an indefeasible title, and may be voidable, it will, as to third persons at least, be good till it has been avoided. It must in some sense pass the property, for if it did not, it may be doubtful whether a conviction for obtaining the goods could be sustained. Here it is clear that there was in the first instance an intention on the part of the original owner that the property should pass. [LORD PENZANCE :—But was it not the intention that it should pass to *Blenkiron*, but not to *Blenkarn*?] As to some person in *Wood Street* the intention plainly did exist that it should pass. [LORD PENZANCE :—Is there no distinction between the case of a man who, being deceived, enters into a contract, and that of a man who, being also deceived, does not enter into a contract?] The latter was the case of *Hardman* v. *Booth* (4), so much relied on in the Court below. But that case is distinguishable from the present, for there the facts shewed distinctly that the intention was to contract with *Thomas Gandell & Co.*, and with them alone; and the firm of *Edward*

(1) 1 Q. B. D. 348.

(2) 2 Q. B. D. 96.

(3) There had been, in the Courts below, a question as to the effect of the statute 24 & 25 Vict. c. 96, with regard to the restitution of the property to the original owner after the conviction of the person who had fraudulently obtained it. That question was also made the subject of argument in this House, but the judgment did not refer to it.

(4) 1 H. & C. 803.

H. L. (E.) 1878 CUNDY v. LINDSAY.

Gandell & Todd was a different firm and carried on business at a different place, and was wholly unknown to the Plaintiffs, and *Edward Gandell* having by fraud got hold of the goods sent to the warehouse of *Thomas Gandell*, carried them off to his own place, and so disposed of them. Here the Plaintiffs themselves sent the goods to the person who had corresponded with them, and who did carry on business at 37, *Wood Street*. The goods reached that destination, and were delivered there according to the address which the Plaintiffs had put upon them. The facts of the two cases were unlike, and without in the least doubting the decision in that case, it may well be contended not to be applicable here. Here the original owner allowed the goods to remain in the hands of the person to whom he had sent them, and while there they were sold to the Defendants, who were *bonâ fide* purchasers for value. After that the vendor could no longer follow them as his own; his intention had been to transfer them, and the transfer was complete. In no way whatever could the case be compared to one in which money or a bill of exchange was delivered to a person for a particular purpose, and he used it for another, and so could give no title whatever to a third person to whom he passed it. Neither was this a delivery to *B.*, who stated himself to be the agent of some one else when he was not so; it was a delivery to *B.* himself. Credit was therefore given to him; it was given to *Blenkarn & Co.*, of 37, *Wood Street*. Then again, in the first instance Mr. *Thompson*, one of the partners in Messrs. *Lindsay's* house, made an affidavit of debt against *Alfred Blenkarn*, which shewed that the house recognised *Blenkarn* as the debtor, and the transaction as one of a sale. That, though not conclusive on the subject, was at least strong evidence of previous intention. It may be admitted that where the authority to part with the property is limited, and the property is parted with in disregard of that limited authority, the title to it would not pass: *Reg.* v. *Middleton* (1); but that cannot affect this case, for here the goods were transmitted by the owners themselves to a person and a place described by themselves. The title to the goods was for the time perfect in law, and, being so, the transfer to the Defendants made during that time, being made *bonâ fide*, could not be impeached: *Pease* v.

(1) Law Rep. 2 C. C. R. 38.

Gloahec (1). Till the title of *Blenkarn* was disaffirmed it was good, and the property disposed of in the meantime could not afterwards be followed in the hands of a third person who had honestly purchased it.

Mr. *Wills*, Q.C., and Mr. *Fullarton*, for the Respondents:—

Where the circumstances are such that no contract has ever arisen, mere delay in declaring a disaffirmance cannot affect the case: *Kingsford* v. *Merry* (2); *Boulton* v. *Jones* (3); *Hardman* v. *Booth* (4). Here there was no contract. The Plaintiffs did not know of the existence of two firms of names similar to each other carrying on business in *Wood Street;* they knew only of *Blenkiron & Co.*, and thought they were dealing with *Blenkiron & Co.*, and sent their goods to that firm. But *Blenkiron & Co.* knew nothing whatever of the matter. There was, therefore, no contract with them. Nor was there any with *Blenkarn*, for by a fraud in using the name of other persons he obtained possession of goods intended for those other persons, and not for him. There was, therefore, no contract with him. If so, no moment existed during which a title to the goods could be given to the Defendants. Their conversion of the goods was consequently unlawful.

The *Solicitor General* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well known rules of law. Now, with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what

(1) Law Rep. 1 P. C. 219.
(2) 1 H. & N. 503.
(3) 2 H. & N. 564, see *Re Reed*, 3 Ch. D. 123.
(4) 1 H. & C. 803.

H. L. (E.) 1878 CUNDY v. LINDSAY.

may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. *Lindsay* to *Alfred Blenkarn*? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, *Blenkarn* might have conveyed a good title for valuable consideration to the present Appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon paper. The prin-

cipal parties concerned, the Respondents and *Blenkarn*, never came in contact personally—everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by *Blenkarn*, by the mode in which his letters and his applications to the Respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the Respondents; that by all those means he led, and intended to lead, the Respondents to believe, and they did believe, that the person with whom they were communicating was not *Blenkarn*, the dishonest and irresponsible man, but was a well known and solvent house of *Blenkiron & Co.*, doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that *Blenkarn*—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of *Blenkiron & Co.*, the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself but, the firm of *Blenkiron & Co.* Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and *Blenkarn*, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was

H. L. (E.) 1878 CUNDY v. LINDSAY.

merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of *Blenkiron & Co.* of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the Respondents, and the title which was attempted to be given to the Appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here, is this: whether or not any contract was actually entered into between the Respondents and a person named *Alfred Blenkarn*, who imposed upon them in the manner described in the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from *Alfred Blenkarn*.

Now the case is simply this, as put by the learned Judge in the Court below; it was most carefully stated, as one might expect it would be by that learned Judge: "Is it made out to your satisfaction that *Alfred Blenkarn*, with a fraudulent intent to induce customers generally, and Mr. *Thomson* in particular, to give him the credit of the good character which belonged to *William Blenkiron & Sons*, wrote those letters in the way you have heard, and had those invoices headed as you have heard," and farther than that, "did he actually by that fraud induce Mr. *Thomson* to send the goods" "to 37, *Wood Street?*"

Both these questions were answered in the affirmative by the jury. What, then, was the result? It was, that there were letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of *Blenkiron & Co., Wood Street.* That was done by a falsification of the signature of the *Blenkirons,* writing his own name in such a manner as that it appeared to represent the signature of that firm. And farther, his letters and invoices were headed "*Wood Street,*" which was not an accurate way of heading them; for he occupied only a room on a third floor, looking into *Little Love Lane* on one side, and looking into *Wood Street* on the other. He headed them in that way, in order that by these two devices he might represent himself to the Respondents as *Blenkiron* of *Wood Street.* He did that purposely; and it is found that he induced the Respondents by that device to send the goods to *Blenkiron* of *Wood Street.* I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the *Blenkirons* of *Wood Street,* if they had chosen to adopt it, and to no other person whatever—not to this *Alfred Blenkarn,* with whom the Respondents had not, and with whom they did not wish to have, any dealings whatever.

My Lords, it appears to me that that brings the case completely within the authority of *Hardman* v. *Booth* (1), where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud who obtained possession of them, because they were not *to him* sold. Exactly in the same way here, there was no real contract whatever with *Alfred Blenkarn;* no goods had been delivered to anybody except for the purpose of transferring the property to *Blenkiron* (not *Blenkarn*); therefore the case really in substance is the identical case of *Hardman* v. *Booth* (1) over again.

My noble and learned friend who sits opposite to me (Lord *Penzance*) has called my attention to a case which seems to have been decided on exactly the same principle as *Hardman* v. *Booth* (1), and it is worth while referring to it as an additional authority upon

(1) 1 H. & C. 803.

H. L. (E.) 1878 CUNDY v. LINDSAY.

that principle of law. It is the case of *Higgons* v. *Burton* (1). There, one *Dix*, who had been the agent of a responsible firm that had had dealings with the Plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the Plaintiff in the action, and, having concealed that dismissal, continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent; but he had been dismissed from the agency—there was no contract, therefore, with the firm; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to his loss. The point of the case is put so very shortly by Chief Baron *Pollock*, that I cannot do better than adopt his reasoning: "There was no sale at all, but a mere obtaining of goods by false pretences; the property, therefore, did not pass out of the Plaintiffs." The other Judges, who were Barons *Martin*, *Bramwell*, and *Watson*, concurred in that judgment.

Here, I say, exactly as in those cases of *Hardman* v. *Booth* (2), and *Higgons* v. *Burton* (1), there was no sale at all; there was a representation, a false representation, made by *Blenkarn*, by which he got goods sent to him, upon applications from him to become a purchaser, but upon invoices made out to the firm of *Blenkiron & Co.* But no contract was made with *Blenkarn*, nor any contract was made with *Blenkiron & Co.*, because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property.

We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued with eminent ability for the Appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from whom

(1) 26 L. J. (Ex.) 342. (2) 1 H. & C. 803.

he wished to obtain the goods, and had represented that he was a member of one of the largest firms in *London*. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm, or suppose he had said: "I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers;" then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly—I say no more—have passed the property.

But this case is an entirely different one. The whole case, as represented here is this; from beginning to end the Respondents believed they were dealing with *Blenkiron & Co.*, they made out their invoices to *Blenkiron & Co.*, they supposed they sold to *Blenkiron & Co.*, they never sold in any way to *Alfred Blenkarn;* and therefore *Alfred Blenkarn* cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property nor with anything more than the possession of it.

LORD PENZANCE:—

My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the Respondents parted with their goods. Whether by so doing they passed the property in them to *Alfred Blenkarn* is I conceive the real question to be determined.

The Respondents had never seen or even heard of *Alfred Blenkarn*, when they received a letter followed by several others signed in a manner which was not absolutely clear, but which the writer intended them to take, and which they did take, to be the signature of a well-known house of *Blenkiron & Co.*, which in fact

H. L. (E.) 1878 CUNDY v. LINDSAY.

carried on business at No. 123, *Wood Street*. The purport of these letters was to order the goods now in question. The house of *Blenkiron & Co.* was known to the Respondents, and it was also known that they lived in *Wood Street*, though the Respondents did not know the number. The Respondents answered these letters, addressing their answers to *Blenkiron & Co.* in *Wood Street*, but in place of No. 123, they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to *Blenkiron & Co.*, No. 37, *Wood Street, London*. It is not doubted or disputed that throughout this correspondence and up to, and after, the time that the Respondents had dispatched their goods to *London*, they intended to deal and believed they were dealing with *Blenkiron & Co.*, and with nobody else; nor is it capable of dispute that, when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of *Blenkiron & Co.*, to whom they addressed these goods. The goods, however, were not delivered to *Blenkiron & Co.*, to whom they were addressed, but found their way to the hands of *Alfred Blenkarn*, owing to the number in *Wood Street* being given as No. 37, in place of No. 123—a mistake which had been purposely brought about by the writer of the letters as I have before mentioned, who was no other than *Alfred Blenkarn*, and who had an office or room at No. 37, *Wood Street*.

In this state of things, it is not denied that the contract, or dealing, which the Respondents thought they were entering into with *Blenkiron & Co.*, and in fulfilment of which they parted with their goods, and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that *Blenkiron & Co.* knew nothing of the transaction. But, say the Appellants, it was a contract with, and a good delivery to, *Alfred Blenkarn* so as to pass the property in the goods to that individual, although the goods were not addressed to him and the Respondents did not know of his existence.

I am not aware, my Lords, that there is any decided case in which a sale and delivery intended to be made to one man, has

been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the Appellants can be maintained. It was indeed argued that as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shewn that the Respondents knew that there was such a person, and that he had offices there—whereas the contrary is the fact, and the Respondents only adopted the number because it was given as the address in letters purporting to be signed "*Blenkiron & Co.*"

My Lords, I am unable to distinguish this case in principle from that of *Hardman* v. *Booth* (1), to which reference has been made. In that case *Edward Gandell*, who obtained possession of the Plaintiff's goods, pretended to have authority to order goods for *Thomas Gandell & Co.*, which he had not, and then intercepted the goods and made away with them; the Court held that there was no contract with *Thomas Gandell & Co.* as they had given no authority, and none with *Edward Gandell*, who had ordered the goods, as the Plaintiffs never intended to deal with him.

In the present case *Alfred Blenkarn* pretended that he was, and acted as if he was, *Blenkiron & Co.* with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me to be quite alike.

Another case of a similar kind is that of *Higgons* v. *Burton* (2), to which similar reasoning was applied.

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can I think be parallel with that which your Lordships have now to decide. For in the

(1) 1 H. & C. 803.

(2) 26 L. J. (Ex.) 342.

H. L. (E.) 1878 CUNDY v. LINDSAY.

present case the Respondents were never brought personally into contact with *Alfred Blenkarn*; all their letters, although received and answered by him, were addressed to *Blenkiron & Co.*, and intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to *Blenkiron & Co.*, though at a wrong address.

This appeal ought therefore, in my opinion, to be dismissed.

LORD GORDON concurred.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 4th March, 1878.

Solicitors for the Appellants: *Charles O. Humphreys & Son.*
Solicitors for the Respondents: *Ashurst, Morris, Crisp, & Co.*

[HOUSE OF LORDS.]

JOHN COX . . . . . APPELLANT; H. L. (E.) 1878 March 26.

AND

EDWARD HARRIS RABBITS . . . . . RESPONDENT.

Land Tax—Exemption—Hospital.

Taxing Acts must be construed strictly; Where therefore land which, in the 4 Wm. & M., being employed for charitable purposes, as the site of an almshouse or hospital, was, on that account, declared by a statute then passed (c. 1) to be exempt from the land tax at that time imposed—and the like words of exemption were used in a subsequent statute (38 Geo. 3, c. 5),—the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the Court of Chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt.

THE Act of 4 Wm. & M. c. 1, *Land Tax Act*, which imposed the land tax, was passed in 1692, and sect. 25 contained a provision that "nothing contained in this Act shall extend to charge any hospital for or in respect of the sites of the said hospital. . . . or in respect only of any rents or revenues payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor in the said hospitals and almshouses only."

By the 38 Geo. 3, c. 5, the last of the annual Acts granting the land tax, sect. 25, it was enacted that "nothing in the Act shall extend to charge any hospital in *England*, &c., for or in respect of the sites of the said hospital or any of the buildings within the walls or limits of the said hospital, or to charge any hospital or almshouse in *England*, &c., for or in respect only of any revenues which on or before the said 25th of March, 1693, were payable to the said hospital or almshouse, being to be received and disbursed for the immediate support and relief of the poor of the said hospital or almshouse only."

The 26th section provided that no tenants holding lands from

H. L. (E.) 1878 Cox v. Rabbits.

the said hospitals or almshouses should claim or enjoy any freedom or exemption under the Act, but should be rated for so much as the lands were worth, over and above the rents reserved to the hospitals to be received and disbursed for the relief of the poor of the said hospitals or almshouses.

The 29th section enacted that "all such lands belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the fourth year of the reign of their late majesties King *William* and Queen *Mary*, should be liable to be charged to land tax, and that no other lands, tenements, or hereditaments, &c., then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, should be charged to land tax," by that Act.

By the 38 Geo. 3, c. 60, the land tax was made perpetual, subject to redemption, but no alteration was introduced affecting the provision already mentioned.

Long before the passing of these Acts, certain land belonging to the *Fishmongers' Company*, situate in the parish of *St. George, Southwark*, had been occupied with almshouses erected by the *Fishmongers' Company*, and known by the name of *St. Peter's Hospital*. These almshouses had been so erected from money supplied by the company, and by certain private benefactors, and had been established as a charity under the authority of letters patent granted in 1618 by King *James* I. The land and the almshouses thereon had never been assessed to the land tax. In 1848 the company purchased the fee simple of some land at *Wandsworth*, the land tax on which had been redeemed, and in July, 1849, a suit was instituted on the information of the Attorney-General, and an order was made therein, authorizing the *Fishmongers' Company* at its own expense to take down the almshouess in *St. George, Southwark*, and to erect an equal number on the newly purchased land at *Wandsworth*, allowing the company to appropriate to its own use the materials of the old almshouses, and to hold the site thereof discharged from the charitable trusts to which they were then subject. This was done, and the new almshouses have since been occupied and used for the purposes of the charity.

The land which had been the site of the old almshouses, having thus returned to the possession of the company, had since been demised to Mr. *Rabbits* on a building lease for 72 years from September, 1858. The present Appellant, as representing the Land Tax Commissioners, claimed to charge land tax on the land which had been the site of the almshouses, but was now held by Mr. *Rabbits* under lease from the *Fishmongers' Company*, and had made a formal seizure in assertion of the claim. An action of trespass was thereon brought, and a Case was stated for the purpose of obtaining the opinion of the Court. The Queen's Bench had given judgment for the Defendant. On appeal that judgment was reversed, and judgment ordered to be entered for the Plaintiff (1).

Mr. *E. Clarke*, and Mr. *G. E. Lyon*, for the Appellant:—

The Legislature no doubt intended to exempt from the land tax lands actually employed as hospitals or almshouses, for charitable purposes, but only in respect of the purposes for which they were so employed, and while they were so employed. It never could have been intended to create a perpetual exemption in favour of certain lands, without regard to the character which they then bore, or might afterwards bear, since that might be made the subject of a very extended abuse. When the reason, for which this special exemption had been allowed, entirely ceased, the land resumed its ordinary character, and, being undistinguished from the other land in the kingdom, became like that other land subject to the taxation imposed by these Acts of Parliament. The imposition of the land tax was general and for important public purposes. Certain special exemptions had been granted, but those who claimed them were required to shew clearly the grounds on which the claim was rested. All that was shewn here was, that certain land, the site of almshouses, and, as such, devoted to the purposes of charity, had, by force of the very words of the Land Tax Acts, been exempted from the tax. But the site was now employed for private and profitable purposes; the reason for exemption

(1) 3 Q. B. D. 307.

H. L. (E.) 1878 Cox v. Rabbits.

therefore entirely ceased, and the exemption ceased also. The 25th and 29th sections of the Act of Geo. 3 must be construed together, and, so construed, there was no ground for the continuance of the exemption. *Lord Colchester* v. *Kewney* (1) shewed clearly that exemption from a general tax was not to be extended by mere implication. The institution there established was undoubtedly one of a charitable nature, but because it did not fall within the very words of the exemption contained in the Act, it was held to be liable to the tax.

The Solicitor-General (Sir *H. S. Giffard*), and Mr. *Lumley Smith*, for the Respondent:—

The land in question was, when the 4 W. & M. c. 1 was passed, free from liability to tax, the statute recognised and declared its exemption. The object of the statute was that land which thus contributed to the relief of the poor should not be subjected to the special taxation then created. It is not pretended to be denied that it was then exempt. It so continued, without any question whatever, till the almshouses were removed. To make it become liable after that time, an express declaration of its liability was required. None had been made. Whether the land had been the actual site of the building or not, made no difference. In the absence of anything imposing the tax, it remains free. Independently of which, if it was now to be subjected to the tax, the object of the Legislature in exempting lands which contributed to charitable purposes would be defeated, for the land purchased at *Wandsworth* and dedicated to the same charitable purposes as the original land, having been liable to the tax, but having had its liability to the tax redeemed, and having been purchased on that account at an enhanced cost, the charity would in effect be made liable to the tax, which it was the plain intention of the Legislature it should not bear.

1878 *March* 26.

The Lord Chancellor (Lord *Cairns*):—

My Lords, the question to be decided on this appeal is an extremely short one, and the argument is now condensed into a

(1) Law Rep. 1 Ex. 368; Law Rep. 2 Ex. 253.

very narrow compass. The Court of Appeal, which consisted of four Judges, was unanimously of opinion that the property in question, formerly the site of a hospital, though now no longer so, having in the beginning once enjoyed exemption from the land tax, still kept that exemption, and I own that I can see no reason whatever to differ from the decision of the Court of Appeal.

I think the view which has been presented on behalf of the Respondent is the correct one, namely, that although the Act of Parliament (38 Geo. 3, c. 5) is not perhaps in some respects perfectly clear in its words, yet the intention and effect of it was merely to continue a charge existing at the time the Act was passed, and there to leave the matter. Where the charge existed when the Act passed, there it remained; but where the effect of the Act was not to impose a charge, no charge could take place, and nothing has been done since to impose a charge, for the later Act of the 38 Geo. 3, c. 60, merely made the existing annual charge perpetual.

Looking at it in that point of view, the 29th section of the Act of Geo. 3 is perfectly intelligible; and although there may, as between the 29th section and the 25th section, be a certain amount of duplication of enactment; still the object of the 29th section is obvious. It enacts that "all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the 4th year of the reign of their late majesties King *William* and Queen *Mary*, shall be, and are hereby adjudged to be, liable to be charged towards the payment of this present aid." Now it is admitted that the land in question, the land as to the taxability of which your Lordships have to express your opinion, does not come within this part of the 29th section, because it was not assessed in the fourth year of the reign of *William* and *Mary*. But the section then continues thus: "and that no other lands, tenements, or hereditaments, revenues, or rents whatsover then belonging to any hospital or almshouse, or settled to any pious uses as aforesaid, shall be charged, taxed, or assessed by virtue of this present Act towards the said sum to be raised, anything herein contained to the contrary notwithstanding." Now here we have "other lands"

H. L. (E.) 1878 Cox v. Rabbits.

which were "then belonging to a hospital," and therefore we have an Act of Parliament declaring with regard to those other lands, that they shall not be charged, taxed, or assessed by virtue of this present Act, and that, wholly regardless of the fact whether the land has or has not continued to be land used for the preservation of one of these institutions.

My Lords, a Taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed. Now, my Lords, it appears to me that, so far from there being words imposing a tax here, you have words which clearly declare that the tax is not to be imposed; and I find nothing to shift to some subsequent period the taxing of this property, or in effect to make this Act subservient to the purpose of imposing a tax on land which in the first instance is declared to be exempt from tax.

I therefore propose to your Lordships that this appeal be dismissed with costs.

Lord O'Hagan:—

My Lords, I am of the same opinion. The point in this case is one which, although it is material, is certainly both very short and clear.

It is our duty as a Court of construction to give effect to the terms of an Act of Parliament, if those terms are plain and unequivocal, and we are not at liberty to wander beyond its terms, or to contravene its intention. Now here we have an Act which is as plain and unequivocal in its terms as ever came before your Lordships. The 29th section of the Act of *George* III. is open to two constructions, and it was, I think, almost confessed by the very able counsel who argued the case on behalf of the Appellant, that if the 29th section had stood alone, he could not have argued the case. That section makes the matter perfectly clear within itself. In the first place, it affirmatively declares the liability of certain premises to the tax, and then, in negative words, it emphatically relieves other sets of premises from any liability whatever. It is conceded that the premises in question are such as are within the description of those so relieved from liability, and therefore it

does not seem to me possible that we should differ from the unanimous decision of the Court of Appeal. For my own part, I should have had no doubt at all in the case, but that I find that very able Judges have taken a different view of it.

My Lords, all that we have heard in the way of argument amounts to this: there has not been any attempt to construe the 29th section according to the view of the Appellant, but there has been an attempt to connect that section with the 25th section, and to say that because the 25th section deals with a portion of the subject matter of the 29th section, therefore we are to forget the 29th section altogether and to regard only the 25th section. Now I agree with the observation of the last learned counsel who addressed the House, that if the 25th section is to be considered partial, and the 29th section universal, and we must choose between the two, we should take the latter as the more extensive in its effect. I do not think that it is necessary for me to say more than that there is no conflict whatever between those two sections; and, although the one goes farther than the other, it does not follow that we, as a Court of construction, should fail to give effect to all the portions of the larger of the two. The nature of the Act has been referred to by my noble and learned friend. It is not only a Taxing Act; it is also an Act in relief of charitable institutions, and we may reasonably suppose that it was the intention of the Legislature to relieve them not merely for the time but permanently; and if the construction put upon this statute by the learned Judges of the Court of Appeal be not the correct construction, it is plain that the benefits which were intended by the Legislature to be accorded to these charities would be taken from them.

On the whole, my Lords, I feel no doubt at all that this appeal should be dismissed.

Lord Blackburn:—

My Lords, I am of the same opinion.

The Act of the 4 Wm. & M., which originally imposed the land tax, gives in the 25th section an enumeration of the exemptions. It provides that "nothing contained in this Act shall extend to charge any college or hall in either of the two universities;" and

H. L. (E.) 1878 Cox v. Rabbits.

then it enumerates a considerable number of hospitals and colleges by name, ending with "the college of *Bromley*," and it goes on, "or any hospital"—the general word "hospital" comes in there—"for or in respect of the sites of the said colleges, halls, or hospitals," and then it provides afterwards, repeating the same enumeration, that the Act shall not extend to charge any of the houses or lands belonging to the hospitals and colleges which it enumerates. Then it goes on to provide that it is not to "extend to charge any other hospitals or almshouses for or in respect only of any rents or revenues payable to the said hospitals or almshouses being to be received and disbursed for the immediate use and relief of the poor in the said hospitals or almshouses only."

Now when the Act of the 38 Geo. 3, c. 5, came to be passed, the 25th section provided "that nothing in this Act contained shall extend to charge any college or hall in either of the two universities or the colleges of"—and then it enumerates them all, ending with, "*Bromley*," "or any hospital in *England*," "for or in respect of the sites of the said colleges, halls, or hospitals." Then we come afterwards to these words: "or to charge any of the houses or lands which on or before the 25th day of March, 1693" (that is before the Act of *William* and *Mary*), "did belong to the sites of any college or hall in *England*," "or to," and then it enumerates the hospitals. Then comes the third thing, namely, "or shall extend to charge any other hospitals or almshouses in *England*, *Wales*, or *Berwick-upon-Tweed*, for or in respect only of any rents or revenues which on or before the said 25th day of March, 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only."

My Lords, the hospital, the old site of which you are now dealing with, *St. Peter's Hospital*, was not one of those enumerated hospitals, though it did exist before 1693. It came within the general words of the 25th section of the Act of 4 Wm. & M., no doubt, and its site, at that time, was not liable to be assessed to the land-tax, because it was "a hospital" within the meaning of that Act. Now, the 25th section of the Act 38 Geo. 3 applies thus far; it speaks of "any hospital," that is to say, any hospital existing at

the time of the passing of the Act of 38 Geo. 3, whether existing in *William* III.'s time or not, and says that if it existed at the time of the passing of the Act of 38 Geo. 3, no such hospital shall be charged in respect of its site. The previous enactments had been to the effect that a large sum of money should be imposed upon each county, and that the charge upon each county should be divided among the different parishes and districts within the county, and that ultimately it should be levied and charged upon the lands or the persons occupying them. Then this 25th section exempts a hospital from charge in respect of its site. Now, if the hospital could not be charged, nobody would be chargeable in respect of the site of the hospital as long as it continued such. In the nature of things, the college or the hospital must be itself the occupant of its site, and the land tax could not be imposed upon it while it so continued; but when it ceased to be so, unless there was some other exemption it would be liable to be taxed as land under the previous enactment. If there had been only this enactment, that a college or hospital should not be taxed in respect of its site, the land would have been exempt no longer than it was occupied as such site.

But I confess it seems to me that the 29th section must have been passed expressly with the view of meeting that, because it says, "it is hereby enacted that all such lands, revenues, or rents belonging to any hospital, or almshouse, or settled to any charitable or pious use, as were assessed in the 4th year of the reign of their late Majesties King *William* and Queen *Mary*, shall be and are hereby adjudged to be liable to be charged," that is to say, all lands belonging to any college or hospital which were not part of the site, and the moneys derived therefrom which were not applicable to the purpose of the relief of the poor of the college, hospital, or almshouse, were liable to be charged. But then it enacts in negative terms "that no other lands" "belonging to any hospital, or almshouse, or settled to any charitable or pious uses as aforesaid, shall be charged, taxed, or assessed in virtue of this present Act, towards the said sum to be raised in *England*." Now, this being a hospital which existed in the reign of *William* III., and these lands having then been part of the site of that hospital, I cannot

H. L. (E.) 1878 Cox v. Rabbits.

find any words in this Act which would make this not apply; "and no other lands whatsoever then belonging to it shall be charged or assessed," that is to say, no other than those which were already taxable. This land was not assessable in the reign of *William* III., and there is nothing whatever to re-impose a charge on the land after it had once been taken away.

It seems to me, therefore, that the decision of the Court of Appeal in this case was right, and should be affirmed.

Lord Gordon:—

My Lords, I do not now think it necessary to say more than that I consider the decision of the Court of Appeal to be quite right.

Order appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 27th March, 1878.

Solicitors for Appellant: *Simpson & Palmer.*
Solicitor for Respondent: *C. O. Humphreys.*

[HOUSE OF LORDS.]

FREDERICK B. CHATTERTON AND BENJAMIN WEBSTER . . . . . } APPELLANTS;

AND

JOSEPH ARNOLD CAVE . . . . . RESPONDENT.

H. L. (E.)
1878
March 7, 28.

Dramatic Copyright—Materiality of Imitation—Judge's Explanation.

There cannot be a violation of the 3 & 4 Will. 4, c. 15, s. 2, where the matter or thing taken from the first work and introduced into the second is not material and substantial.

A. had produced a drama on the tale as written, and the play as acted, of "*The Wandering Jew*," the authorship of M. *Eugène Sue*, but had introduced two scenic representations into his production, not to be found in the French original; and *B.* afterwards produced a drama on the same subject, in which these two scenic representations were also introduced; an arbitrator had found "that two scenes or points had been taken direct from the drama of the Plaintiffs, but that the drama of the Defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the Plaintiffs," and had directed the verdict to be entered for the Defendant:—

Held, that the finding was conclusive.

The words in the statute "production or any part thereof" must receive a reasonable construction, and are to be treated as implying some part that is substantial and material.

At the trial the cause had been withdrawn from the jury and submitted to the decision of the Judge. On a motion that the verdict should be entered for the Plaintiffs, or a new trial granted, on the ground that the representation, by the Defendant, of part of the Plaintiffs' play had been found as a fact, the Judge (who was a member of the Court where the case was pending) explained to his brethren on the Bench what was the meaning he intended to convey by the finding:—

Held, that it was competent for him to do so.

IN this case an action had been brought under the 3 & 4 Will. 4, c. 15 (the *Dramatic Copyright Act*), against the Defendant in respect of his having committed an infringement of the copyright of the Plaintiffs in a drama founded on the novel by *Eugène Sue*, called "*The Wandering Jew*." There had been a drama in French founded on the same novel, and the version claimed by the Plaintiffs, prepared by Mr. *Lewis* and assigned by him to them, was an adaptation from the French. The Defendant had since brought out

H. L. (E.) 1878 CHATTERTON v. CAVE.

another adaptation, which it was alleged was, in part, an imitation of the former, and had thereby committed an infringement of the Plaintiff's copyright.

The cause came on for trial before Lord *Coleridge*, C.J., at the Middlesex Sittings after Trinity Term, 1874. After the case had been partly heard it was agreed between the parties that the jury should be discharged, that Lord *Coleridge* should "read the plays and novel, and have evidence on such points as he may desire, either given before him, or the result found for him by an arbitrator, and thereupon to enter verdict. Either party to have leave to move the Court upon the finding. Plays or novel to be referred to by the Court on the argument. All points of law reserved."

On the 2nd of September, 1874, his Lordship published his finding, which was in the following terms: "I find in this case that two scenes or points of the drama of the Defendant have been taken direct from the drama of which Mr. *Lewis* was the author and the Plaintiffs the assignees, without recourse to either the French novel or the French drama, originals common to the dramas of both the Plaintiffs and Defendant. I find this, first, in respect of the final scene of the Defendant's drama; and, secondly, of the appearance of the *Wandering Jew*, and the stage business connected with that appearance, which are to be found in the second scene of the second act of the Defendant's drama, and in the fourth scene of the first act of the Plaintiffs' drama. I find that the drama of the Defendant is not, except in these respects, a copy from, or a colorable imitation of, the drama of the Plaintiffs. I direct the verdict to be entered for the Defendant. I assess the damages at 40*s.*, if, upon argument, as provided by the terms agreed to at the trial, the Court should be of opinion that the verdict ought to be entered for the Plaintiffs."

The case was argued upon a rule obtained to enter the verdict for the Plaintiffs. When the rule came on for hearing, Lord *Coleridge* was present and explained the grounds on which his finding proceeded, and in his judgment said: "What I meant to convey by my finding was, that two points or situations there had been an imitation of the Plaintiffs' drama by the Defendant. These points, so copied, were not parts of the composition or dialogue of the Plaintiffs' drama, but were in the nature of dramatic situations

or scenic effects. It appeared to me that, looking to the general character of the two dramas respectively, the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the Defendant's drama from any portion of the Plaintiffs'." The rule to enter the verdict for the Plaintiffs was discharged (1). On appeal this decision was affirmed (2).

Mr. *Higgins*, Q.C., and Mr. *H. Poulter* (Mr. *C. N. Watts*, and Mr. *A. B. Terrell*, were with them), for the Appellants:—

The ground on which the finding was said to be based was erroneous in fact and in law. In fact, the parts of the Plaintiffs' drama which were imitated in the Defendant's drama were substantial and material; they were called in the finding "points," but they were effective representations and striking dramatic incidents, and gave a character to the whole performance.

But even if they had only been "points" they were "parts" of the dramatic representation, and so came within the very words of the statute. The law which applied to dramatic representations was not entirely like that which applied to book writing; of the two it was necessarily stronger and more restrictive on a pirating dramatist, for a "point" in a drama might really involve a whole scene and give a character to the whole drama itself. The imitation here was so close that in fact, the two subject matters, the original and the imitation, were identical. That fact, however, seemed to have been overlooked in the Court below. The principle on which the construction of the Act ought to proceed was clearly pointed out in *Planché* v. *Braham* (3). There the singing of a very small part of the Plaintiff's production was held to bring the case within the Act. In the Court below (4) the expressions used by Lord *Cottenham* in *Bramwell* v. *Halcombe* (5) were misunderstood and misapplied, for Lord *Cottenham* distinctly said "it is not quantity, but value, that is to be looked to." That is what the Appellants say here. The scenes, or "points," as they were called, were

(1) Law Rep. 10 C. P. 572, where the facts are fully stated.
(2) 2 C. P. D. 42.
(3) 4 Bing. N. C. 17.
(4) Law Rep. 10 C. P. 575, 581.
(5) 3 My. & Cr. at p. 737.

H. L. (E.) 1878

CHATTERTON v. CAVE.

material, valuable, and striking points, and affected considerably the attractiveness of the drama, and no one doubted that they had been copied from the Plaintiff's production.

It was to be recollected that in the statute of 3 & 4 Will. 4, neither the word "material" nor "substantial" was to be found. The words were "production or any part thereof." The words "any part" were here introduced for the first time—they were not to be found in any of the previous Copyright Acts, and the intention was to afford a most complete protection to the dramatic author. That phrase "any part" must receive its natural meaning. In the Court below it seemed to have been supposed that either the very language of the original drama, or a very considerable portion of the drama, must be taken in order to bring the case within the statute. That was not so. The statute intended to prevent the copying and reproduction of every and any part, without regard to its importance, as was shewn by the provision that any such unlawful representation should render the person making it liable to the "payment of an amount not less than 40*s.*," while a more extended imitation of the original would subject him to "the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the Plaintiff therefrom." If, therefore, there was any imitation whatever, the Plaintiff was entitled to a sum of not less than 40*s.*; while a more material imitation would entitle him to substantial damages. In *Clementi* v. *Golding* (1) the Court had held that something printed on a single sheet of paper was to be treated within the meaning of the Statute of *Anne* as "a book" (2). That was an authority to shew the spirit in which these Acts were to be construed. The principle that quantity alone was not required to constitute an infringement of copyright was shewn in *D'Almaine* v. *Boosey* (3), where it was held that there might be piracy in taking part of an air—a rule acted on in *Leader* v. *Purday* (4); *Lover* v. *Davidson* (5); *Chappell* v. *Sheard* (6); *Chappell* v. *Davidson* (7). It made no difference that here the two dramas had been taken from a common source, for that was so in several of these cases; it was the original

(1) 2 Camp. 25; 11 East, 244.
(2) See also *White* v. *Geroch*, 2 B. & A. 298.
(3) 1 Y. & Co. (Ex.) 288.
(4) 7 C. B. 4; 18 L. J. (C.P.) 97.
(5) 1 C. B. (N.S.) 181.
(6) 2 K. & J. 117.
(7) Ibid. 123.

adaptation that constituted authorship, and that was not to be imitated and plagiarised. [LORD O'HAGAN:—Is not the finding of Lord *Coleridge* the finding of a jury? Is not that final? Suppose that a jury had found that a part had been taken, but that the part taken was really immaterial?] Even then the Plaintiffs would be entitled to judgment, for the statute spoke of taking "any part," and said nothing about its being a material part. *Jerrold* v. *Houlston* (1) has been misunderstood. It is true that that case declares that an essential part of the work must be taken, but what is essential is not a matter to be measured by quantity alone; nor, if two dramas are adapted from the same work, does it declare that a scene really introduced by the first adapter may be imitated by the second. That has been done here.

The explanation of the finding given by Lord *Coleridge* ought not to have been received by the Court. Its introduction was not warranted by *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2), for that case expressly decided that no question could be put to an arbitrator as to what passed in his own mind when exercising his discretionary power. Here the explanation entirely bore that character. No explanation by jurymen of their verdict would have been receivable; nor was the explanation of an arbitrator, which really amounted to putting a construction on his award, admissible.

Mr. *Digby Seymour*, Q.C., and Mr. *Little* (Mr. *L. Smith* was with them), for the Respondent:—

The finding was entirely a finding for the Defendant. It stated that two points or scenes had been taken, but added that they were so unimportant, not being substantial or material, as not to furnish ground for an action. The fact being determined, the other matter—the consequence of that fact—was a question of law. The two dramas were drawn from a common source; of course, therefore, they resembled each other, but unless a material part of one was copied into the other there was no infringement of copyright. The object of the statute 3 & 4 Will. 4, c. 15, and that which succeeded it, 5 & 6 Vict. c. 45, was to protect that which was properly called dramatic or musical composition, not little

(1) 3 K. & J. 708. (2) Law Rep. 5 H. L. 423.

H. L. (E.) 1878 CHATTERTON v. CAVE.

incidents connected with the development of them. The intention of the Legislature was clear. The statute forbad producing the "production or any part"; that clearly meant a real substantial part, not a mere bit of stage effect, or a word or a sentence, the idea of which might have been suggested to any number of minds drawing their inspirations from the same source. *Bramwell* v. *Halcomb* (1) did not warrant such a narrow construction as was here contended for by the Appellant, and *Saunders* v. *Smith* (2) was in spirit quite adverse to it. In *Pike* v. *Nicholas* (3) it is clear that Vice-Chancellor *James* thought the Act not infringed when the part taken was not material, for he prefaces his judgment by saying (4), "The part taken in this case is material and is substantial"; and Lord Justice *Giffard*, adopting the same idea, said (5), "Some material part of the book must be shewn to have been taken." The same idea governed the decision in *Bradbury* v. *Hotten* (6). The statute did not mean "part" to be read "particle," it meant a substantial and material part.

In *Jerrold* v. *Houlston* (7) it was decided that the Plaintiff must prove that some essential part of his work had been taken, and that case was referred to and adopted by Mr. Justice *Lindley* in the present (8). And that was plainly the sensible and proper construction of the law, for otherwise no one could tell how he might, even unintentionally, commit, by a very slight similarity of a very small expression, an invasion of a previous author's copyright. The statute must receive a reasonable construction, such as had been recently put upon the provisions of the *Piers and Harbours Act* (9), where a strict adherence to the mere words of the Act would have led to great inconvenience and injustice.

Lord *Coleridge* was a Judge of the Court which heard and decided the case, and was fully entitled to explain to his brethren on the Bench the views he had entertained when the case was before him. He was in the same situation as a Judge who had tried a case, and whose view of what took place at the trial was

(1) 3 My. & Cr. 737.
(2) Ibid. 711.
(3) Law Rep. 5 Ch. 251.
(4) Ibid. at p. 260, n.
(5) Ibid. at p. 268.
(6) Law Rep. 8 Ex. 1.
(7) 3 K. & J. 708.
(8) Law Rep. 10 C. P. 580.
(9) *The River Wear Company* v. *Adamson*, 2 App. Ca. 743.

always received upon the argument on a motion to enter the verdict for one party or the other.

Mr. *Poulter* replied.

LORD HATHERLEY :—

My Lords, in this case the Appellants were the Plaintiffs, and the Respondent Defendant, in an action brought in the Court of Common Pleas by the Plaintiffs, who claimed to be proprietors of a dramatic piece called "*The Wandering Jew*," and who alleged against the Defendant that he had caused to be represented divers parts, scenes, stage-play, and dramatic business of such piece at a place of dramatic entertainment without the consent in writing, or at all, of the Plaintiffs, contrary to the provisions of the 3 & 4 Will. 4, c. 15, s. 2. The Defendant pleaded not guilty, and also that the Plaintiffs were not proprietors of the work.

The case came on for trial before Lord *Coleridge*, when it was agreed, "that the jury should be discharged, and that Lord *Coleridge* should read the original French novel and the French play, and the Plaintiffs' and Defendant's versions, and should order how the verdict should be entered, having power to hear evidence on such points as he desired." Some points of law had been raised on behalf of the Defendant, as to the date and sufficiency of the assignment from *Leopold David Lewis* to the Plaintiffs, and it was part of the said agreement that "leave was reserved to either party to move on any point of law that had arisen or might arise."

On the 2nd of September, 1874, the Lord Chief Justice delivered to the solicitors of the parties his finding :—[His Lordship read it: see *ante*, p. 484.]

On the 7th of November, 1874, a rule was granted by the Court of Common Pleas calling on the Defendant to shew cause why the verdict should not be set aside and a verdict entered for the Plaintiffs, pursuant to leave reserved or a new trial had between the parties, on the ground of misdirection in this, that the Judge, upon the finding, should have caused the verdict to be entered for the Plaintiffs, as representation by the Defendant of part of the Plaintiffs' play was found. This rule came on to be argued before the Court, consisting of Lord Chief Justice *Coleridge*, Mr. Justice

H. L. (E.) 1878 CHATTERTON v. CAVE.

(now Lord Justice) *Brett*, Mr. Justice *Grove*, and Mr. Justice *Lindley*, who unanimously concurred in discharging the rule with costs. At the hearing on this occasion, Lord Chief Justice *Coleridge* stated verbally that what he meant to convey by his finding was that, looking to the general character of the Plaintiffs' and Defendant's dramas, the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the Defendant's drama from any portion of the Plaintiffs'.

The Plaintiffs appealed from this judgment to the Court of Appeal and, on the 30th of November, 1876, that Court, then consisting of the Lord Chief Justice of *England*, Lord Justice *Mellish*, Lord Justice *Amphlett*, and Lord Justice *Bramwell*, unanimously affirmed the judgment of the Court of Common Pleas, and from this decision the Plaintiffs have appealed to your Lordships' House.

Under these circumstances, my Lords, it appears to me that your Lordships must regard as established the facts found by Lord Chief Justice *Coleridge* under the reference made by the order of the 19th of June, 1874. I take these facts to be—1st. That the Defendant did take two scenes of his drama, viz., those specified in Lord *Coleridge's* note, direct from the drama the right of property in which is in the Appellants. 2nd. That such taking was not a substantial and material taking of any one portion of the Plaintiffs' drama.

An attempt has been made to limit this finding to the written note of the Lord Chief Justice. It has been indeed contended that it was not competent to him to explain his written note by word of mouth. It was urged that his position, under the agreement which was come to between the parties, was similar to that of a jury which has delivered a verdict, or of an arbitrator who has delivered his award. But in the first place it was not incumbent on the Lord Chief Justice to deliver any such written note at all; it would have been sufficient for him to direct judgment to be entered for the Defendant, and to state the facts upon which he come to the conclusion, by word of mouth. He was not in the position of a jury who, being discharged, or having retired after

verdict, cannot be again summoned together, or of an arbitrator whose authority is at an end when the award is delivered. His note, coupled with the direction which it contains for entering the verdict for the Defendant, is not contradicted but explained by his verbal statement, made at the hearing of the argument on the rule *nisi* in the Common Pleas. The finding so explained was adopted by both the Court of Common Pleas and the Court of Appeal, and it appears to me that your Lordships will not feel justified in reviewing that which may be regarded as a verdict on the matter of fact.

The argument, however, before your Lordships has turned mainly on the construction to be put upon the statute of 3 & 4 Will. 4, c. 15 (the *Dramatic Copyright Act*), which extends the protection given in respect of published works to dramatic performances, not published otherwise than by their representation. It was necessarily admitted by the counsel for the Appellant, that, in the case of ordinary copyright of published works, the Plaintiff would not succeed in an action for an alleged invasion of his copyright if it were found, as here, that the passages taken were neither a material nor a substantial part of his work; but it was said that there was a distinction between the two classes of property protected, a distinction recognised by the Legislature in the framing of the Acts relating to these respective subjects; and it was pointed out that whilst books (including by a definition in the Acts single sheets of original composition) were protected, "parts" of books were not specially referred to, whereas in the *Dramatic Copyright Act* "parts" of dramatic works are specially mentioned in the clause prohibiting their use by others than the proprietor; and again, it was called to our attention that on the Plaintiff's establishing his title in any action, and the infringement by the Defendant, the Act as to dramatic copyright directs that not less than 40*s.* damages shall be awarded by the jury. It was suggested that these differences indicated an intention to prevent the invasion of dramatic copyright independently of the quantity or materiality of the portion of dialogue or dramatic incident proved to have been copied by the Defendant.

Now it appears to me, my Lords, that this argument goes much too far. As was said by the counsel for the Respondent, the

H. L. (E.) 1878 CHATTERTON v. CAVE.

Appellant would wish to read the word "part" in the *Dramatic Copyright Act* as "particle," so that the crowing of the cock in "*Hamlet*," or the introduction of a line in the dialogue, might be held to be an invasion of copyright entitling the Plaintiff to 40*s.* damages and consequently, as the law stood I believe at the time of the passing of the statute of 3 & 4 Will. 4, to the costs of his action.

There is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like—and if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, "a fair use" only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book.

The minimum of damages, to be awarded when the fact of damage and the right to damages have been once established, was no doubt fixed, because of the difficulty of proving with definiteness what amount of actual damage had been sustained, by perhaps a single performance at a provincial theatre of a work belonging to a Plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it.

It was urged that a wholly worthless drama might be unprotected, as every part of what was wholly worthless would be in itself worthless. This is really only a play upon the word "worthless." The drama may be worthless in the judgment of people of any degree of refinement, and yet attractive to others who can afford to pay for the privilege of witnessing its representation, and the fact of any considerable portion being pirated by another author would indicate that some value at least must be attributed to it in this lower sense. In the case before us we have the verdict of the Judge, selected by the parties, on the fact; and the

unanimous concurrence of the other Judges before whom the case was brought justifies I think that finding; and I think that your Lordships will not be disposed to disturb the finding which has been so come to.

The case of *Planché* v. *Braham* (1) was very much pressed upon the attention of this House, but, though the portion there taken was minute, it must be remembered that it consisted of songs, the words of which were adopted, without license, (in preference to those which had been otherwise published,) by a celebrated singer, and probably much of the value of the work might be due to its association with that singer's name. These songs would perhaps be one of the chief points of the drama's success, and therefore if wrongly introduced in the Defendant's piece might materially damage the value of the Plaintiff's drama.

I think, my Lords, regard being had to the whole of this case, to the finding of the Lord Chief Justice that the parts which were so taken were neither substantial nor material parts, and the impossibility of damage being held to have accrued to the Plaintiff from such taking, and the concurrence of the other Judges before whom the case was brought, that this appeal should be dismissed, and dismissed with costs.

LORD O'HAGAN:—

My Lords, in this case, the unanimous judgment of the Court of Appeal, which the Appellants ask your Lordships to reverse, affirmed the unanimous judgment of the Court of Common Pleas, in favour of the Respondent. I have no doubt that the decision was correct, and that the appeal should be dismissed with costs.

The Plaintiffs were possessed of the right of exclusively representing a drama called "*The Wandering Jew*," and they complained that the Defendant had represented another piece, with the same title, which appropriated from it certain scenes, in violation of that right. They, therefore, claimed a penalty under 3 & 4 Will. 4, c. 15.

It appeared at the trial before Lord *Coleridge*, Lord Chief Justice of the Common Pleas, that "*Le Juif Errant*," of *Eugène Sue*, had been dramatized in French, and, afterwards, in English by a writer

(1) 4 Bing. N. C. 17.

H. L. (E.) 1878 CHATTERTON v. CAVE.

who had assigned his interest to the Plaintiffs; and it was alleged that the Defendant had also dramatized it, and had infringed their copyright by the performance of his adaptation, which was partly taken from the drama so vested in them. A question arose, as to the source from which the Defendant had derived the two incidents of his work which were relied upon as constituting the infringement—whether they were taken from the original novel or the French play founded upon it, or were directly borrowed from that which had become the Plaintiffs' property? As to this, the learned Judges seem to have differed in opinion, although, on the whole case, they reached the same conclusion. But I do not think that your Lordships are required to enter on the consideration of that question.

Upon the imperfect information before us, I am not sure that I should have been prepared entirely to concur with the Lord Chief Justice as to the grounds of the verdict which he entered: but the consent of the parties clothed him with all the functions of a jury, and his finding as to facts appears to me, in the present position of the case, unimpeachable and conclusive. The reference was made to him in the largest terms. He was to read the novel and the plays, and receive such evidence as he might deem material; and, thereupon, he was to pronounce a verdict. He has done so. He has found for the Defendant, and he has stated the views which appeared to him to warrant his decision. This is the finding:—[His Lordship read it, see *ante*, p. 484.]

If the matter had rested there, the Appellants' contention would have been, at least, more sustainable, for the written finding does not contain any express averment as to the materiality of the "scenes" or "points" taken from the drama of Mr. *Lewis*. But when the Plaintiffs, in pursuance of leave reserved at the trial, moved the Court of Common Pleas to have the verdict set aside, and a verdict entered for them, the Lord Chief Justice explained the finding verbally, and more fully informed his learned brethren with reference to it in these terms:—[His Lordship stated them, see *ante*, p. 484.]

Now, before we approach the single legal question in the case, we must dispose of a point which, although the last raised in argument, ought to be first considered, for the purpose of ascer-

taining the principles on which our decision should be based. The finding declares that the two "scenes" or "points" were taken direct from the drama of Mr. *Lewis:* but, as I have said, it makes no express averment as to their materiality and importance. The judgment, however, very clearly says that their extent was so slight, and their effect so small, as to render the taking perfectly immaterial. Can we consider both the allegations, or are we bound to have regard to the finding alone? I am clearly of opinion, with the whole Court of Appeal, that both the statements, and not one only, must be taken into account for the purpose of determining as to the correctness of the verdict. And I concur with the statement of Lord Justice *Mellish:* "It does not matter whether we take the finding from what the Chief Justice has written or what he has said. It seems to me that on the questions of fact the Plaintiffs are concluded" (1).

The Appellants have argued as if the finding was a judgment, conclusive until reversed or modified; or a special verdict containing an exhaustive statement of all the facts from which a legal inference may be drawn. It is neither the one nor the other. The Lord Chief Justice was not required, or authorized, by the arrangement at the trial to frame a special verdict, or to enter a judgment. He was simply substituted for the discharged jury, and empowered, on such evidence as might have been presented to the jury, to find a verdict. All points of law were reserved, and either party was to have liberty to move the Court, according to circumstances. The Chief Justice had no need to do more than simply to direct the entering of the verdict, and the preliminary statements of the finding, with which he thought proper to preface it, were not necessarily, and did not purport to be, a representation of all the conclusions of fact on which it was founded.

When the question was raised in the Common Pleas, the learned Judge set out fully the reasons which had dictated his direction; and it seems to me impossible to maintain that he was precluded, by the document he had signed, from communicating to his colleagues an essential portion of those reasons, or that your Lordships can now be required to put it out of your consideration.

I am not at all prepared to say that, if the written finding stood

(1) 2 C. P. D. at p. 43.

H. L. (E.) 1878 CHATTERTON v. CAVE.

alone, it should not, even so, have been affirmed. Although it has not any explicit allegation as to the character of the "scenes" or "points" which it finds to have been taken, their immateriality must, I think, have been implied to make the averment of fact and the conclusion of law reasonable and consistent with each other. The learned Judge appears to have believed that it would be implied accordingly, but his judgment put the matter beyond controversy: and it is unnecessary to consider what might have been our opinion on the finding *per se*, if it had not been supplemented and supported by that unequivocal judgment.

Suppose the case had been tried by a Judge of another Court, under similar circumstances, and he had reported to the Common Pleas, on a new trial motion, the reasons of his finding, they must have been accepted in their integrity and at their true legal value, and your Lordships must have so accepted them; and how is the matter altered because Lord *Coleridge* is the Chief Justice of the Court, and reports directly to it, by word of mouth?

When a jury has formally delivered its verdict and been discharged, or an arbitrator has signed and sealed his award, and become *functus officio*, it would be manifestly dangerous, as it is legally impossible, to vary the one or the other by subsequent statements of those who have pronounced them. But the position of the Lord Chief Justice was wholly different, in this respect, from that of a jury or an arbitrator; and his declaration in Court lost nothing of its authority because it had not more distinct expression in his finding.

I repeat, therefore, that, in my opinion, the case must be decided by reference at once to the finding and the judgment; and, this being so, we have the Lord Chief Justice, acting as a jury, at the instance of the parties, and ascertaining two things, as matters of fact: first, that the "points" were taken from the drama of the Plaintiffs; and, secondly, that they were so trifling and immaterial as to render the taking a nullity. The facts being so established, I think that your Lordships will not have much difficulty in disposing of the case.

The Plaintiffs contend that, under the 2nd section of the Act, making it penal to represent any protected drama, "or any part thereof," the Defendant is liable for copying the scenes or points

of the Plaintiffs' production, although they were so valueless that, in the words of the Chief Justice, "there was no substantial and material taking of them."

No doubt, any scene, or point, or incident, or line, or word, in a drama, is a part of it; and no doubt it is the duty of a Court of construction to carry out the plain intentions of the Legislature strictly, even though it may not approve of them as sound in principle, or wise in policy, or just in operation. But we should scrutinise carefully the terms of a Statute before we lend ourselves to administer it with ill results, and see whether it forces us inevitably to produce them: and we may properly consider how other Acts *in pari materiâ*, or of a like kind, have been dealt with by Courts of Justice, that we may be guided to make our interpretation reasonable and correct. Here, the section we are required to interpret provides that a penalty shall be incurred for a proceeding "contrary to the intent of the Act or right of the author"; and, to ascertain the intent to be enforced and the right to be protected, we are at liberty to look at the preamble, which recites the 54 Geo. 3, c. 151, and declares it to be expedient "to extend the provisions of the said Act." And the extension is made, not by any enlargement of the effect of those provisions, but by their application to a class of persons and to productions different from those to which they had originally been applied.

It is clear, that the Legislature intended to afford the protection already given to copyright in books, to the authors and owners of dramatic productions; and it seems quite proper to apply the same principle of construction to Statutes which aim at objects substantially the same. And this the more, if the application enables us to avoid a plainly absurd or inconvenient conclusion.

I shall not trouble your Lordships by discussing, in detail, the many authorities which have been cited as to the interpretation to be put upon the Acts which regulate copyright in books. They seem one and all to assume, or to affirm expressly, that to render a writer liable for literary piracy, he must be shewn to have taken a material portion of the publication of another:—the question as to its materiality being left to be decided by the consideration of its quantity and value, which must vary indefinitely in various

H. L. (E.) 1878 CHATTERTON v. CAVE.

circumstances. As Lord Chancellor *Cottenham* said in *Bramwell* v. *Halcomb* (1): "It is useless to refer to any particular cases as to quantity." The quantity taken may be great or small, but if it comprise a material portion of the book, it is taken illegally. The question is as to the substance of the thing, and if there be no abstraction of that which may be substantially appreciated, no penalty is incurred.

In all the cases, the matter is dealt with as one of degree. In all, quantity and value are both the subjects of consideration, and in none of them has an infringement been established without satisfactory evidence of an appropriation, possibly involving a substantial loss to one person and a substantial gain to another; although, as was observed by Lord Chief Justice *Tindal* in *Planché* v. *Braham* (2), "the damage to the Plaintiff is not the test of the Defendant's liability," and the penalty is to be paid, "even if there is no actual damage."

It is true, as was pressed upon your Lordships, that the Act of Geo. 3 does not contain the words "or any part thereof," which are inserted in the statute of Will. 4. But this does not appear to me to create any real distinction between them. Some such words must necessarily be implied in the earlier statute. Otherwise, the author of a book could not bring his action unless there had been a piracy of the whole of its contents; and any partial appropriation of them could not authorize the claim for a penalty. No one has suggested a construction so manifestly inconsistent with the clear purpose of the Legislature; and it seems to me that all the authorities as to a partial taking are fairly applicable to the *Dramatic Copyright Act*, and if so, an infringement of it, to be penal, must be material and of a substantial kind.

I need not add anything to the observations of my noble and learned friend as to the distinction between literary and dramatic copyright.

The question in every case must be a question of fact: and a jury cannot be constrained to find every infinitesimal taking to be the taking of a "part" of a dramatic production, within the purview of the statute. "Part," as was observed, is not necessarily the same as "particle," and there may be a taking so minute in

(1) 3 My. & Cr. at p. 738. (2) 4 Bing. N. C. at p. 19.

its extent and so trifling in its nature as not to incur the statutable liability. Here we have two findings:—one that the scenes were taken, the other that they were of no substance or effect on the "total composition" of the drama. If the argument of the Appellants be maintained, the first finding was in itself conclusive, and, upon it, a Judge would have been compelled to direct a verdict for the Plaintiffs. In that view the second was entirely irrelevant and immaterial. But reason and authority combine to shew its relevancy, and its necessity to the determination of the cause, and, having been made, it seems to me binding on your Lordships. There was certainly evidence to go to a jury, or to a Judge acting as a jury, in support of the Respondent's view; and I see no ground on which the verdict found on that evidence is impeachable, even though we should doubt its absolute correctness. I do not think, as I have said, that we can now consider whether the "points" were taken from the French drama or from the English. On that matter, the learned Lord Chief Justice appears to have differed somewhat from his brethren: but it is enough for us to have had it ascertained that those "points," whencesoever derived, were of such a character as to form no "part" of the drama, the appropriation of which could constitute an offence.

The case of *Planché* v. *Braham* (1) was pressed upon your Lordships as the chief authority in support of the Appellants. I have considered that case, and I think it is an authority the other way. There, the Defendant used the words of two or three songs of the Plaintiff as the vehicle of some airs in an English version of *Weber's* opera of "*Oberon*," and the action was brought under the 3 & 4 Will. 4, c. 15. The rest of the version had been written by another person. There was no question as to appropriation of the music: and Lord Chief Justice *Tindal* left it to the jury to say whether there had been a representation of a part of the Plaintiff's dramatic production. The jury found, and I think rightly found, that there had been: and gave a verdict for the statutable penalty. Serjeant *Wilde* moved to set the verdict aside, on the ground that as there had been no representation of a part of the Plaintiff's piece,—the words of the songs adapted to the music being immaterial to the development of the drama,—the Defendant

(1) 4 Bing. N. C. 17.

H. L. (E.) 1878 CHATTERTON v. CAVE.

was entitled to a judgment. But the Court affirmed the verdict, holding that the question before it must "in all cases" be determined by a jury. "It is difficult," said the Chief Justice, "to say what is or is not a representation of a part of a dramatic production, ... and it must be left to a jury to determine the fact." All the Judges concurred in this opinion and refused to interfere, without regard to the merits of the finding, because the question was within the jury's province and had been properly left to their decision.

The ruling of Lord *Coleridge* appears to me to be sustained by this case in all its parts. As a Judge, he declined to direct the jury in the Defendant's favour merely because there had been a taking of the "points;" and in that refusal the judgment in *Planché* v. *Braham* (1) expressly approves his course. On the reference to him as a jury, he found the fact that those points did not constitute a part of the drama; and the same judgment declares that such a finding, having been legitimately made by the proper tribunal, ought not to be disturbed.

The judgments of the Court of Appeal and the Court of Common Pleas must, in my opinion, be affirmed, and the appeal dismissed, with costs.

LORD BLACKBURN:—

My Lords, I also am of that opinion.

The 3 & 4 Will. 4, c. 15, contains only two sections. The first section enacts that the author of any dramatic piece or his assignee, shall have as his own property the sole liberty of representing or causing to be represented, any such production at any place of dramatic entertainment in any part of the British dominions, and shall be deemed and taken to be the proprietor thereof. Had the statute stopped there, the proprietor of the dramatic work would have had a right to recover damages against any one who infringed his right of property by representing the production, or so much of the production as to infringe his right of property in it, but there might have been frequently difficulty in getting a jury to find more than nominal damages, and the Plaintiff would get no costs. At least, those who framed the Act seem to have thought so; for by the 2nd section it is provided

(1) 4 Bing. N. C. 17.

that if any one represents any such production, or any part thereof, the damages shall be at least forty shillings, with double costs.

The case was argued at your Lordships' bar by the counsel for the Appellant very much as if these words were equivalent to "represent a drama of which any particle has been taken from the production." But this is not so. There may be a representation of part so as to infringe on the author's right of property, though the person representing it was quite unconscious that he was taking anything from the Plaintiffs' drama, and indeed was not aware he had composed one: *Reade* v. *Conquest* (1). On the other hand, an idea may be taken from a drama and used in forming another without the representation of the second being a representation of any part of the first. For example:—I have no doubt that *Sheridan*, in composing "*The Critic*," took the idea from "*The Rehearsal*," but I think it would be an abuse of language to say that those who represent "*The Critic*," represent "*The Rehearsal*," or any part thereof; and if it were left to me to find the fact, I should, without hesitation, find that they did not.

On the other hand, in composing "*The Trip to Scarborough*," *Sheridan* took so much from "*The Relapse*" that if it were left to me to find the fact, I should find that those who represent "*The Trip to Scarborough*" do represent parts of "*The Relapse*."

In the present case, however, in which both Plaintiffs and Defendant avowedly took all their materials from the French drama and novel, it was essential for the Plaintiffs to shew that the Defendant had not merely taken the materials from the same source as the Plaintiffs, but that he had taken a part of the Plaintiffs' drama ready made. Still that was not the issue, but whether in representing his drama the Defendant represented the Plaintiffs' drama or any part thereof. That, according to *Planché* v. *Braham* (2), is a question of fact, depending, amongst other things, on more or less. Had this case gone to its regular termination, the Chief Justice must have left it to the jury to say

(1) 11 C. B. (N.S.) 479. (2) 4 Bing. N. C. 17.

H. L. (E.) 1878 CHATTERTON v. CAVE.

whether there had or had not been a representation of part of the Plaintiffs' drama. He would have had to give such directions as seemed to him proper, to guide the jury in determining that question, and either party might have had those directions reviewed in the Court in banc. It was apparently felt that (even if the jurors were all able to read French) a satisfactory verdict, depending on the comparison of three plays and a novel, could hardly be expected from twelve jurors, and therefore it was (I think very reasonably) agreed that the Chief Justice should determine how the verdict was to be entered, "either party to have leave to move the Court upon his finding. Plays or novel to be referred to by the Court on the argument. All points of law reserved." Though it is not expressly agreed that the Chief Justice should state to the Court on what principles he comes to his conclusion, it is clearly intended that in some way or other he should do so, for otherwise no point of law could be reserved. The usual way in which a Judge communicates to a Court what he has ruled, is by a statement which, if he is a member of the Court, is generally verbal; and if he is not a member of the Court, is generally in writing; but in either case, if it is not sufficient, the statement is supplemented. A common way in which this is done is, that a member of the Court sees the Judge, getting from him his verbal explanations, and reporting them to his brethren.

In this particular case the Chief Justice in the vacation wrote, and I presume communicated to the parties, a statement which has been called his finding. He there stated that he found that two scenes or points had been taken direct from the Plaintiffs' drama, but nevertheless directed the verdict to be entered for the Defendant. On this (if unsupplemented) the only point of law that could arise would have been whether two points in the Defendant's drama being taken direct from the Plaintiffs' drama, it necessarily followed as a matter of law that the representation of the Defendant's drama containing those two points was a representation of part of the Plaintiffs' drama within the meaning of the statute. I have already expressed my opinion that this did not necessarily so follow. But, if no other point was raised for the Court, this would have been a very imperfect fulfilment of the Chief Justice's reservation of all points of law. The Chief Justice

very properly (in my opinion) reported a farther explanation, which is contained in the report of the case (1).

The Court of Appeal said that his decision must be taken to be in his finding, as explained by him during the discussion before the Court of Common Pleas. I think this was quite right, and that your Lordships should do so too. And this enables the Plaintiffs to raise farther points, and to contend not only that a representation of a drama, two points in which were taken direct from the Plaintiffs' drama, was necessarily in point of law a representation of part of the Plaintiffs' drama (on which I have already expressed my opinion as being against the Plaintiffs), but also that in coming to the conclusion that it was not such a representation, the Chief Justice acted on wrong grounds. If the Chief Justice had left the question to the jury, and told the jurors in his summing-up that it was proper for them to consider exactly the same things which he says were the grounds of his own decision; if he had told them that, in considering the question whether the Defendant had represented part of the Plaintiffs' drama, they were to consider not only whether the Defendant took these two points direct from the Plaintiffs' drama, but also the nature of the two points which were not parts of the dialogue or composition of the Plaintiffs' drama, but were in the nature of dramatic situations or scenic effects; and that they were also to consider the general character of the two dramas, and the extent to which one was taken from the other, and its effect upon the total composition, and then to say for themselves whether, in representing the Defendant's drama, the Defendant represented what was a part of the Plaintiffs' drama, which was, as *Planché* v. *Braham* (2) decides, a question to some extent of degree; would such a summing-up have been a misdirection? If it would, I am inclined to think that the finding, though by a Judge alone, would have been liable to question in the nature of an application for a new trial; but it is unnecessary to decide that, if, as I think, such a direction would have been unexceptionable.

I do not say that this direction would have been exhaustive. In other cases there may be other considerations proper to be left to a jury, but every one of those above-mentioned was proper in

(1) Law Rep. 10 C. P. 572. (2) 4 Bing. N. C. 17.

H. L. (E.) 1878

CHATTERTON v. CAVE.

the present case; and I see nothing requisite for the decision of this case which has been omitted.

LORD GORDON:—

My Lords, this is an appeal from the unanimous judgment of the Court of Appeal which affirmed a unanimous judgment of the Court of Common Pleas in favour of the Respondent. I have had the benefit of reading the written opinion of my noble and learned friend opposite (Lord *O'Hagan*) which has been also read to your Lordships, and I so entirely concur in the views which he has expressed that I think it is quite unnecessary to say anything in addition to what he has there stated. The other noble and learned Lords who have addressed your Lordships have adopted the same view, so that this again will be a unanimous judgment affirming the other decisions.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 28th March, 1878.

Solicitor for the Appellant: *Horace W. Chatterton.*
Solicitors for the Respondent: *Lewis & Lewis.*

Distinguished. KNOWLES *v.* A.-G. [1950] 2 All E.R. 6.

Distinguished. KNOWLES *v.* ATT.-GEN. [1951] P. 54

[HOUSE OF LORDS.]

THE EARL OF ZETLAND . . . . . APPELLANT;
THE LORD ADVOCATE . . . . . RESPONDENT.

H. L. (Sc.)
1878
Feb. 12.

Entail—Succession Duty Act (16 & 17 *Vict.* c 51)—*Substitute Heirs.*

The 2nd section of the *Succession Duty Act* (16 & 17 Vict. c. 51), distinguishes succession by "disposition" from succession by "devolution of law;" and the rate of duty is to be regulated by the propinquity of the successor to the "predecessor." The "predecessor" may be determined by considering whether the succession is by "disposition" or by "devolution of law."

Substitute heirs of entail not called *nominatim*, nor coming under a descriptive designation as the head of a new *stirps*, will be held to take by *devolution of law*, and not by *disposition*, and the *predecessor* in the sense of the *Succession Duty Act* will be the last possessor.

Under two entails executed by his lineal ancestors, the Earl of *Zetland* succeeded his uncle as heir substitute to estates in *Scotland*:—

Held, confirming the decision of seven Judges of the Courts below, that within the meaning of the statute 16 & 17 Vict. c. 51, the uncle was the "*predecessor*" of the Earl, and that therefore taking by "devolution of law" he was liable to duty at the rate of three per cent.

Per LORD HATHERLEY:—The person named specifically and *nominatim* in the deed would take the property by virtue of the deed alone, but those who derive any title by operation of law would have to pay as claiming an interest which would be pointed out by the law alone.

Per LORD SELBORNE:—*Devolution by law* takes place whenever the title is such that an heir takes under it by descent from an "ancestor" according to the rules of law applicable to the descent of heritable estates, and in all cases of descent the estate of the successor is immediately "derived" from the "ancestor" from whom the estate descends.

Per LORD HATHERLEY:—The word "ancestor" used in the Act is properly assignable to the person who really preceded in the estate, although that person may not be the progenitor of the successor.

Power of Appointment by Selection.

Per LORD HATHERLEY:—In the case of appointment by selection, the real author from whom the beneficiary takes his succession is the person who has given such limited power of selection.

Lord Saltoun's Case (1) discussed.

IN 1873 the Earl of *Zetland*, the Appellant, succeeded his uncle, as heir under two deeds of strict entail, to large estates in *Scot-*

(1) 3 Macq. 659.

H. L. (Sc.) 1878

EARL OF ZETLAND v. LORD ADVOCATE.

land. A question arose as to the succession duty payable, the Lord Advocate on behalf of the Crown contending that the Appellant had succeeded by devolution of law to his uncle, his predecessor, and that, being a descendant of a brother, the duty payable was at the rate of three per cent (1).

The Appellant maintained that the duty should be only one per cent., as in the sense of the statute, 16 & 17 Vict. c. 51, s. 2 (2), his predecessors in the estates were the makers of the two entails, his lineal ancestors, from whom he derived the estates by disposition.

The first of the two deeds of entail was executed and recorded in 1768 by Sir *Lawrence Dundas*, of *Kerse*, of certain lands in the county of *Stirling* and elsewhere, the destination being to the entailer's eldest son as institute, and his heirs male, whom failing to certain substitute heirs. On the death of Sir *Lawrence Dundas*, his son, afterwards Lord *Dundas*, the institute under the entail, succeeded to the estate, and in 1813 obtained a private Act of Parliament (3) to disentail certain lands upon entailing others of an equal value. This deed contained a destination to the same effect as that of the deed of 1768. After the death of Lord *Dundas* in 1820, his eldest son, the first Earl of *Zetland*, succeeded to the estates contained in both the entails, excepting the lands excambioned. He died in 1831, and was followed by his eldest son, the second Earl, in the enjoyment of the property. In 1852 and 1865 the Earldom of *Orkney* and the Lordship of *Zetland* and various portions of the estate were disentailed, with the consent of the three next heirs of entail (4). The second Earl of *Zetland* dying in 1873, the estates came to the Appellant, the eldest son of the brother of the last Earl.

A special case under 19 & 20 Vict. c. 56, was arranged on the

(1) 16 & 17 Vict. c. 51, s. 10: "There shall be levied and paid to Her Majesty . . . where the successor shall be the *lineal issue*, or lineal ancestor of the *predecessor*, a duty at the rate of one pound per centum upon such value. Where the successor shall be a brother, or a sister, or a *descendant of a brother*, or a sister of the *predecessor*, a duty at the rate of three pounds per centum upon such value."

(2) 16 & 17 Vict. c. 51, s. 2: "The term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

(3) 52 Geo. 3, c. 137.

(4) *Rutherfurd Act*, xi. & xii. Vict. c. 36.

13th of June, 1876, between the Lord Advocate and the Appellant. And in July, 1876, the Lord Ordinary (1) found that the uncle, the last possessor, was the predecessor of the Appellant, and that the duty payable was at the rate of three per cent.

As the finding in *The Lord Advocate* v. *Gordon* (2) (July 19, 1872) was directly adverse to the Appellant's contention, the First and Second Divisions of the Court of Session (consisting of seven Judges) were called on to hear the arguments on a reclaiming note. And, on the 6th of December, 1876, the Judges unanimously decided that the duty payable by the Appellant was three per cent (3).

On the appeal to the House,

Mr. *Benjamin*, Q.C., and Mr. *H. J. Moncreiff*, of the Scotch Bar (with them Mr. *T. C. Simpson*), were heard for the Appellant:—

The question was, who should be regarded as the predecessor of the present Earl of *Zetland*. The Appellant had only a life interest, which he derived from the makers of the two entails. He took nothing from the uncle, who had only the revenue of the estates for his life, which ceased at his death. The Appellant was only a trustee of the fee, he could make no change in the estates, except under *Lord Rutherfurd's Act* (4) and with the consent of the three next heirs; whereas an English tenant-in-tail in possession could by a simple deed convert the entail into a fee simple. This afforded the strongest argument of the existence of a beneficial interest in substitutes under entails in *Scotland*, shewing they had an interest notwithstanding another was in possession of the estate. The beneficial interest the Appellant possessed sprung into existence upon his uncle's death by virtue of a provision in the deeds of entail, and was thus a disposition under the very words of the 2nd section of 16 & 17 Vict. c. 51. There were several *dicta* in *Lord Saltoun's Case* (5) adverse to the Appellant's contention, but in the present case the words of description in the two deeds of entail of 1768 and 1813 were

(1) Lord *Shand*.
(2) 10 Macph. 1015; 44 Scotch Jur. 571.
(3) Scotch Cases, 4th Series, vol. iv. p. 179.
(4) xi. & xii. Vict. c. 36.
(5) 3 Macq. 659; 21 Dunlop, 124; 7 June, 1860.

H. L. (Sc.) 1878 — EARL OF ZETLAND v. LORD ADVOCATE.

equivalent to calling the heir *nominatim*. This appeal was brought in consequence of the case of *Gordon* (1) not being appealed from. That case had been decided upon a misapprehension of the real scope of the decision in *Lord Saltoun's Case* (2). The present Earl of *Zetland's* title came through the second Earl, the last possessor, but not from him; he was not the *predecessor* of the Appellant in the sense of the *Succession Duty Act*.

[LORD SELBORNE:—It would follow from your argument that in all cases of devolution of estates tail one per cent. is the rate payable by a lineal descendant.]

The heir derived all his interest from the makers of the entails. *Lord Saltoun's Case* (2) did not expressly decide the point here; all substitutes, whether called by name or not, were in exactly the same position in a Scotch deed of entail, taking by virtue of the entailer's gift; and therefore the same rule ought to be applied, whether called by description only or *nominatim*. They were the same as to their rights and liabilities: see *Stirling* v. *Ewart* (3). The ancestor from whom the Appellant took the estates was not the uncle. The estates being derived by disposition, and not by devolution of law, the duty payable was at the rate of only one per cent., and the judgment below ought to be reversed.

[They also cited: *Attorney-General* v. *Charlton* (4); *Attorney-General* v. *Braybroke* (5); *Attorney-General* v. *Floyer* (6).]

The Lord Advocate (7), and Mr. *J. B. Nicolson* (of the Scotch Bar) were not called upon to address the House on the part of the Crown.

The following opinions were delivered by the Law Peers:—

LORD HATHERLEY:—

My Lords, in this case the question arises upon the amount payable by the Earl of *Zetland* as succession duty under the *Succession*

(1) 10 Macph. 1015; 44 *Scotch Jurist*, 571.
(2) 3 Macq. 659; 21 Dunlop 124 (7 June, 1860).
(3) 4 Dunlop, 684.
(4) 1 Ex. D. 204; 2 Ex. D. 398.
(5) 9 H. L. C. 150; 31 L. J. (Ex.) 177.
(6) 9 H. L. C. 477.
(7) Rt. Hon. *W. Watson*, Q.C.

Duty Act (1), regard being had to the mode in which the estate of which he is in possession, and which is undoubtedly a succession, came to the Earl as successor according to the language of that Act. The question is, what, under the circumstances of his being so possessed of the succession, is the proper duty to be paid. The last taker of the estate, to which he succeeded, was his uncle; and if that uncle was his "predecessor" from whom the estate devolved upon him by law according to the provisions of the Act, he would have to pay 3 per cent. upon the value of the succession ascertained in the way which the Act prescribes. If that was all, it would then be an ordinary succession to an uncle; but the peculiarity of the case is this, that he becomes such successor partly by virtue of an entail created in 1768 by Sir *Lawrence Dundas*, and partly by virtue of an entail created in 1813 by *Thomas* Lord *Dundas*, the life renter under the original settlement of 1768 made by Sir *Lawrence Dundas*.

Now, my Lords, the title stands thus:—The destination in the original deed of the 25th of May, 1768, by Sir *Lawrence Dundas* was in favour of his son *Thomas*, afterwards Lord *Dundas*, in life rent during the days of his life, and after his death to the heirs male lawfully procreated, or to be procreated, of his body in fee, whom failing to certain substitute heirs who are specified in the deed. The deed of 1813, which was executed by *Thomas* Lord *Dundas* when he was in possession, and under the provisions of a certain private Act of Parliament (2) granting him authority so to do, limited the estates in substantially the same manner, namely, to the same *Thomas* Lord *Dundas* in life rent, and then to the heirs male of his body in fee, with remainder over.

My Lords, the question which arises in this case has been comparatively recently discussed in the case of Lord *Saltoun* (3) in your Lordships' House, and the decision which was there come to is undoubtedly one which must have great effect, as it appears to me, in guiding your Lordships to a decision in the present case. In that case the question was whether Lord *Saltoun* was entitled to say that he claimed the succession, as regarded his predecessor, through the medium of his immediate ancestor, or through the

(1) 16 & 17 Vict. c. 51. (2) 52 Geo. 3, c. 137.
(3) 3 Macq. 659.

H. L. (Sc.) 1878 — Earl of Zetland v. Lord Advocate. — Lord Hatherley.

medium of the entail which had been created by his grandmother, and which entail pointed to him as the substitute *nominatim* instead of including him, by virtue of the disposition therein contained, in the description of "heirs male of the body" of either the institute or one of the substitutes. The question arose, therefore, whether the author of the entail was the predecessor in that state of circumstances where the successor had been named in the instrument, and had taken the succession in that manner from the persons who had been previously named in that instrument, or whether the successor was entitled to say that he claimed in the direct line from the persons who were immediately anterior to him in the possession of the estate, and to whom, therefore, he might by virtue of his position assert that he was properly to be called, within the meaning of this Act to which I am now about to refer, the successor, and entitled, as such successor, to the property.

Now the Act itself, in the second clause, contains all that is necessary for disposing of the present case, although reference has been made to the third and fourth clauses, which I will briefly notice before concluding; but that clause directs that

> Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation.

Then comes the second head:

> And every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

Your Lordships had the advantage of a very full discussion of this section and of its true intent and meaning in the case to which I have referred, namely, *Lord Saltoun's Case* (1); and there it appears to have been laid down very distinctly that the object of

(1) 3 Macq. 659.

this section was to point out two classes of cases in which the succession might be claimed by the person who was to be affected by the duty, namely, a disposition by the instrument under which he claimed, or a devolution by law, such as by heirship, or kinship in the case of personal estate (but here we are dealing entirely with real estate), in consequence of which heirship he might claim the property as coming to him by law. That was founded upon a careful examination of the provisions of the section, which seems in every possible form and shape to embrace all the cases which may arise from a disposition of property on the one hand, and from a devolution by law on the other. The words which occur towards the close of the section appear to point to a devolution by law in opposition to a devolution by disposition, a "devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time" there mentioned.

The question which was considered in *Lord Saltoun's Case* (1) was, whether or not Lord *Saltoun* came into the estate as successor by the provisions of a disposition, namely, by a deed of tailzie, or whether he simply came in as heir of the last person who was in possession of the estate under that instrument. What was held in that case must, as it seems to me, guide your Lordships upon the present occasion. It was there pointed out in the first place that, whether judiciously or not, at all events the Act was so framed as to embrace estates both in *Scotland* and in *England*, notwithstanding the great differences between the tenure of property in the two countries, and that therefore a construction must be found which would sustain the Act as applying either to an English or to a Scotch estate; that the same words must regulate the construction of the Act in the one case and in the other. Therefore it was held in *Lord Saltoun's Case* (1) that in construing a Scotch instrument of tailzie the following distinction should be made. Where any person was pointed out specifically and *nominatim* by the deed, in which case the deed and the deed alone regulated the succession, and the succession came by virtue of that deed and by virtue of that deed alone, it therefore was to be traced to the author of the deed—but where the deed had, as

(1) 3 Macq. 659.

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE. Lord Hatherley.

it were, launched the interest which was to be acquired by naming those who came successively into the possession of the particular property, and then passed it in the form of a conveyance under the Scottish law, namely, a deed of tailzie, you were to look into the deed, and after the estate had been so created, which was afterwards to devolve according to the mode assigned by the deed, you were to treat those who subsequently came in as coming in by virtue of devolution by law according to the mode presented in the deed by virtue of the provisions contained in it. In the first case it was held that the deed named the person, and decided everything which had to be decided with regard to his interest in taking as a successor, but when the estate was created and was set moving in the line of descent to heirs special, either heirs male of the body, or otherwise, the deed had performed its functions in creating an interest, and it had left that interest afterwards to devolve by law. The whole reasoning of the decision in *Lord Saltoun's Case* (1) was to the effect that that which had been so left to be disposed of by law would fall under the second head of the 2nd section of the Act to which I have referred, and would pass by a devolution by law upon death, and that although all the persons specifically named in that deed would take the property in the first instance by virtue of the gift, and by virtue of that gift alone, those who derived any title by operation of law upon the death of a predecessor would be held to be persons who would have (whatever might be the consequence of it) to pay, not as claiming a succession under the authority of the deed, but as claiming by operation of law an interest in the property conveyed by the deed, which interest would be pointed out by the law and the law alone.

Now, here the argument has been that a difference exists between the point which was decided in *Lord Saltoun's Case* (1) and the point which has been argued, first by Mr. *Benjamin*, and afterwards by his junior, as to the position of a person not named in the deed; that all that *Lord Saltoun's Case* (1) positively decided was that if a person was named in the deed, and took the beneficial interest intended for him by virtue of the provisions of that deed, the author of the deed must be considered

(1) 3 Macq. 659.

as the predecessor; but that it did not determine anything with reference to those persons who came in in a continual course, as it were, of substitutive limitation according to the description contained in the deed. It has also been argued before us that the heirs male of the body of the first taker were, all of them, as strictly individuals designated and pointed out by the author of the deed, as if he had been able to foresee who they would be, and had pointed out what the operation of the law upon the instrument would be, and had mentioned the different successors by name, instead of saying those who shall be the heirs male. It is quite true that the decision in *Lord Saltoun's Case* (1) does not decide expressly that point; but the whole reasoning of that case proceeds upon the ground of there being a distinct difference, as common sense shews that there is, between the case of a person who is named in an instrument and takes by virtue of being so named, and the case of a person who is not named in any way whatever in the deed, but is merely pointed out as the person who by law will be the successor. All those persons are taken by the Counsel for the Appellant as if they were picked out by the settlor and named one after the other, instead of his summing them up in this way, and saying that they should be those who were the heirs male of the body. It is said that they would take the estate by the Scottish law, not by devolution of law, but by the deed, or at all events, in the strongest way, by the joint operation of the deed and of the law, as pointing out the meaning of those words which have been used by the settlor in his grant.

Now, it is quite true that *Lord Saltoun's Case* (1) has not in so many words decided that point; and I state that more particularly on account of the observations of Lord *Chelmsford* (2) in that case, in which I do not exactly concur, by which he has pointed out what he thinks may be taken to be the view of this particular settlement, namely, that this substitution of heirs of the body of the institute, or of a series of substitutes after the first substitute, is more to be compared with the case of the first and other sons in an English instrument than to be taken as an instance of a succession, in the words of the Act "devolving by law" upon the person who takes as successor. The distinction

(1) 3 Macq. 659. (2) 3 Macq. at p. 686.

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE. Lord Hatherley.

has been laboured very much by Mr. *Benjamin*, and also by his junior to a certain extent. The reason of the difference has been said to be this, that the English law of entail allows the first taker, the institute, or the first substitute, as you might call him, in the Scottish arrangement, to dispose of the estate in such manner as he may think fit, and gives him the complete control over it by virtue of fine or recovery, which power he may or not exercise, but which places in him the entire and absolute fee, so that if he does not dispose of it, it may be said to come as a succession devolved directly upon the successor. My Lords, that does not appear to me to make any substantial difference in the case. The English law has imposed fetters of a certain class; the entail would not be barred if certain formalities were gone through; in some cases, according to the English law, it could not be barred at all. Where the reversion was in the Crown it could not be barred; according to the argument of the Appellant, the Crown would be considered as the settlor from whom the persons must be taken to have derived title for all time, down to the time of the extinction of the estate. It would be a most unreasonable construction of the Act to suppose that any such matter was in contemplation; and that is of itself a considerable argument against any such construction being attributed to the Act.

The truth is this, that the estate when once created by the author of the deed of tailzie in *Scotland*, or the author of the deed of entail in *England*, exists, being an interest which becomes a valuable interest, and which under the terms of the 2nd section of the Act, namely, "property, or the income thereof," comes to the successor upon the death of his immediate predecessor, as an heir in the line of entail. For instance, in this case which we have before us the first taker *Thomas*, afterwards Lord *Dundas*, taking a life rent, would be in a different position of course from any of those persons who are subsequently dealt with. Then come in the heirs of *Thomas* as they may be ascertained by law. They being ascertained by law proceed in a straight line down to the son and the grandson. Then there is a stoppage; the grandson has no child; the consequence is that another line is introduced, and the nephew comes in (being the son of the youngest son) of that grandson who has no issue. Now, how can it be said

that the nephew does not derive title in that case from his immediate predecessor the uncle? I apprehend that the word "derived" at first created some sort of difficulty; that difficulty is adverted to in the case to which I have referred, namely, *Lord Saltoun's Case* (1); but I do not think that, when you consider the case carefully, it presents any such difficulty as would prevent the conclusion which was come to in *Lord Saltoun's Case* being come to by your Lordships on the present occasion.

With regard to this, my Lords, I think that the case is very clearly put by the Lord President (2):

> The entailer has selected the class he wishes to favour—heirs male of the body—but he has left it to the law to say what shall be the order of succession of the individuals within that class. The law on the death of the eldest son of the *nominatim* substitute prescribes that the son of that eldest son, and not his immediate younger brother, shall take as the next heir male of the body of the *nominatim* substitute.

He proceeds to say:

> The will of the entailer, when he calls a class of heirs male of the body, is that the law shall determine within that class who is the person to take on every occasion on which a death occurs among the class causing a devolution of the estate; and from this it seems to follow that on every such occasion the transmission of the estate from the dead to the living is a devolution by law.

That, I apprehend, is a very correct mode of putting it, and when you find the word "derived," which has somewhat of a metaphorical aspect, used in the section, you have to say that the donor points to so many fountain heads, but he leaves it to the law to say which is to "derive" the title to the interest under the settlement. The settlement goes on to a certain point, when it is arrested, we will say, by the death of a person without issue, and nothing being left to the settlor to do, he having done all that he had to do, and given all the directions that he had to give upon the subject in his original deed, the law then provides another channel, following the same course of the stream, going back a little way in the stream, and marking out a channel from thence, and bringing in the nephew as successor to the uncle, and so on. In the later period the title of the successor is derived by law in accordance with the settlement, but it is always derived from the immediate predecessor in the line of heirship which is pointed

(1) 3 Macq. 659. (2) Scotch Cases, 4th Series, vol. iv. p. 204.

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE. Lord Hatherley.

out by the deed. It seems to me that the only function of the deed and the only use of the deed is this: you must go to the deed to find the fountain head, the *stirps*, the institute, or the substitute, as the case may be. When you have found the institute or the substitute, who is given to you *nominatim*, it is left to the law to say how the property shall devolve; the law then takes upon itself that function, and says how it shall devolve. Though it be a fettered estate, it is to devolve to the heirs whom the law points out, and though in *Scotland* it may be fettered, perhaps, more strongly in some points, but less strongly in others, than an English estate tail, nevertheless, as was said in *Lord Saltoun's Case* (1), you have to apply the *Succession Duty Act*, and this second section of it, to the two classes of property, the Scottish class and the English class, and you must adopt such a construction of the Act (as was done in *Lord Saltoun's Case* (1)) as will best suit and harmonize with the two descriptions of property, so as to make the Act sensible in both countries, there being no reason whatever to be assigned for any distinction between the two countries in the amount of duty to be paid in a certain event by the taker of a property in the one country or in the other.

My Lords, taking that view, I do not think it necessary to go through the different authorities which have been cited upon this occasion.

Two other sections of the Act of Parliament have been referred to. One of them relates to the case of joint tenants; but that has, I think, been disposed of by my noble and learned friend Lord *Selborne*. That matter was clearly explained in the course of the argument; each joint tenant has in him an interest together with the other joint tenant, and when one dies off the estate of the other naturally and necessarily becomes enlarged. The other section of the Act, my Lords, is that in which the direction is contained as to an appointment made by a person who has a general power of appointment, as contrasted with an appointment by a person who has only a limited power—a power of selection. In the case of an appointment by selection, the Legislature has very properly considered that the real author from whom the beneficiary takes his succession is the

(1) 3 Macq. 659. (2) Lord *Selborne*.

person who has given such limited power of selection to another, whom he only makes his conduit pipe, his instrument for conveying his bounty, his almoner who is to distribute his property, but who is in no respect the author of the property itself, and is not the person who, as having power over the estate, can do what he likes with it. Whatever he chooses to do with it is his own act, but the right of doing it is derived, and the succession of the person who takes the property is derived, from the author of the deed, who has the sole controlling power. But it is different with an estate tail and a deed of tailzie, and the reason of the difference in such a case as that is very obvious, and it is this, that the author says: "I hand over the estate to you in this particular form, subject to certain restrictions; but I give that benefit also to your heirs in the way which the law will point out; I do not give the benefit as a fee simple, but nevertheless your heirs will take it, and those heirs the law will ascertain."

It would have been very much the same if it had been upon the quantity of the estate instead of the quality. He gives a certain portion of his property, and in so disposing of it he says: "I give it, but as to the devolution of it, that devolution shall be by law—that is to say, in that mode of descent which the law prescribes, having regard to the particular words which I have used."

Accordingly it seems to me, as it did to the Judges who decided *Lord Saltoun's Case* (1), that that devolution takes place which the law prescribes, and it is a devolution by law. The person who so takes the interest takes the interest by operation of law as the heir of the last taker, who was his predecessor, and therefore in this case must pay the three per cent. duty.

An alternative case was raised, which was this, whether the successor could not be said to take as claiming like the first institute or substitute under the common ancestor from whom the title had been derived. If so, inasmuch as in this case that would be a lineal descent, it would give the Appellant what he desires, namely, a duty of one instead of three per cent. But, my Lords, I think that it would be a very strained construction of the Act if we arrived at any such conclusion as that. In a case which I

(1) 3 Macq. 659.

H. L. (Sc.) 1878 — EARL OF ZETLAND v. LORD ADVOCATE. — Lord Hatherley.

have mentioned—the case of gifts of estates from the Crown—there would, under that construction, be ten per cent duty payable upon all successions to those estates. By such a construction of the Act we should get rid of the whole effect, I think, of the decision in *Lord Saltoun's Case* (1), which points out the connection between that part of the Act which speaks of a "devolution by law" and that part of it which speaks of a settlor, donor, ancestor, or other person from whom the estate is derived. The expression "ancestor" is perfectly accurate in a case of this kind. The word "ancestor" is properly assignable to the person who really preceded in the estate, although that person may not be the progenitor of the successor—he may be, as in this case, his uncle. I think that any other construction would lead to a very forced construction of the Act, and would be in direct hostility to the principles upon which *Lord Saltoun's Case* (1) was decided.

Upon these grounds, I propose that your Lordships should affirm the decision of the Court below, and dismiss the appeal with costs.

LORD SELBORNE:—

My Lords, the main argument of the Appellant's counsel has been, that under a strict entail in *Scotland* no beneficial interest is derived by any heir, succeeding to a prior heir of the entailed estate, from such prior heir; because the prior heir had no power of alienation, but was (in substance, though not technically), a mere life-renter; and, therefore, that the interest of such heir can only be considered as derived from the author of the entail, who, in this case, was a lineal ancestor of the Appellant.

With regard to this argument, I am, in the first place, unable to assent to the proposition that the existence or exclusion of a power of alienation over the fee, by the exercise of which the *spes successionis* of the next heir might be disappointed, makes any difference with respect to the question which we have here to decide. Were it so, it must follow equally, in *England*, that whenever there is any legal impediment to the power of an heir in tail to bar the entail, (whether by special Act of Parliament,

(1) 3 Macq. 659.

by the existence of a reversion in the Crown, or by reason of minority), the succession of the next tenant in tail ought to be taxed as if the preceding heir had been a mere tenant for life. But the estate comes to the next taker as much by descent (or "devolution by law") from an heir in tail who cannot alienate, as from one who could do so by the use of means which he has not, in fact, used; and the estate, which so comes to him, is to all intents and purposes a beneficial interest, and not a dry legal title. It is the same estate in law which was in the preceding owner; which was not the less a beneficial fee, though the law placed fetters upon it so far as the power of alienation was concerned.

I have further to observe, that this argument is not only opposed to the views expressed in this House by three (at least) of the Lords who decided *Lord Saltoun's Case* (1), but that it is at variance with the leading principle of that decision; which was to construe the *Succession Act*, with respect to Scotch and English entails, so as to produce, in substance, corresponding effects under both systems of law. The effect of the present argument would be, that the succession duty would be assessed (generally) upon English heirs in tail as taking by devolution of law, and upon Scotch heirs in tail as taking by disposition of the author of the settlement; so that the original decision of the Scotch Courts in *Lord Saltoun's Case* (1) (which was justified if regard ought to be paid only to the technical rules of Scotch law), would have been reversed, and those technical rules set aside, merely to establish, under this statute, a new conflict between the two systems of law, from the opposite direction.

Setting aside, therefore, this argument, and assenting (without any doubt) to Lord *Campbell's* (2) opinion, that under a Scotch entail, a son succeeding as heir substitute to his father derives his interest from his father by devolution of law, the only remaining question is, whether a nephew succeeding to his uncle, under a destination to the heirs of the body of a common lineal ancestor of both, derives his beneficial interest (within the meaning of this Act of Parliament) from his uncle, the last preceding heir in tail, or from their common ancestor?

This is a question attended with no difficulty. The second

(1) 3 Macq. 659. (2) 3 Macq. at p. 671.

H. L. (Sc.) 1878 — Earl of Zetland v. Lord Advocate. — Lord Selborne.

section of the Act distinguishes between two classes of titles, viz., those in which the interest of the successor comes to him by "disposition" (or, in the terms of English law, by *purchase*), and those in which it comes to him by "devolution by law" (or, in English technical phrase as to real property, by *descent*). The predecessor, in cases of "disposition" (or purchase), is the "settlor, disponer, testator, or obligor," "from whom the interest of the successor is derived;"—in cases of "devolution by law" (or descent), he is the "ancestor, from whom the interest of the successor is derived." I omit the words, "*or other person,*" which seem to have been put into the Act only *ex abundanti cautelâ*. Devolution by law takes place whenever the title is such that an heir takes under it by descent from an "ancestor," according to the rules of law applicable to the descent of heritable estates; and in all cases of descent the estate of the successor is immediately "derived" from the "ancestor" from whom the estate descends. The word "ancestor" does not mean, either etymologically or technically, a lineal ancestor only; in illustration of which proposition, I may refer to a passage in *Comyns'* Digest as to the English writ of "*Mort d'Ancestor;*" which (it is said) "does not lie upon the death of any ancestor, except a father, mother, brother, sister, uncle, aunt, nephew, or niece; for, upon the death of another ancestor, an *aiel, besaiel,* or *cosinage,* lies" (1).

Can it then be said that the estate of the present Appellant descended to him, not from his uncle, but from the common ancestor of himself and his uncle, to the heirs of whose body the estate was limited by the entail? It is plainly impossible to say so; for that ancestor was, in this case, a mere life-renter. Or can it be said that the estate descended to him from the institute under the entail, who was also a common ancestor? I think, clearly not. Not only does the decision in *Lord Saltoun's Case* (2) require that, as far as possible, a generally consistent effect should be given to the *Succession Duty Act* under English and Scotch entails; but, in truth, there is very little even of technical difference between the law of *England* and that of *Scotland,* with respect to heirs in tail, taking under such forms of destination as that in the present case. In *England,* as well as in *Scotland,* the heir in tail,

(1) Com. Dig. vol. i., 5th ed., p. 705, tit. Assise C. 1. (2) 3 Macq. 659.

even if issue of the last taker, claims as what the Scotch law calls "heir of provision," or (as the English law says) "*per formam doni.*" "He is" (to use the words of Mr. *Yorke* in his observations on *Dowtie's Case* (1), "as much within the view and intention of the gift or settlement, and as personally and precisely described in it, as his ancestor." But he nevertheless, though obliged to qualify himself as belonging to the special class of heirs designated *per formam doni,* is also obliged, both in English and in Scotch law, to claim as heir (whether lineal or collateral) to the last preceding heir in possession under the entail. In *Scotland* he must, as is admitted, serve himself heir; in *England,* if put to his right of action, he had his writ of *Formedon in Descender,* in which it was always necessary for the demandant to claim by descent, either as son and heir or as cousin and heir to the person last seised.

Upon the same principle depended the effect of the English statutes as to fines, Crown debts, and forfeitures. The *Statute of Fines* (2) made fines, duly levied with proclamations, a bar and discharge for ever against the cognizors (being tenants in tail) "*and their heirs claiming the lands only by force of the entail.*" The words "their heirs" in this statute were held to include, not lineal only, but collateral heirs, such as the Appellant is to his uncle in the present case.

The statute of 26 Hen. 8, as to forfeitures for high treason (on the analogy of the operation of which the opinion of Lord *Hardwicke* in the case of *Gordon of Park* (3) proceeded), forfeited to the Crown all the estates of inheritance of a convicted traitor, but saved all rights and titles of "every person and persons, their heirs and successors, other than the offenders in any treason, their heirs and successors." Under this statute it was determined that the Crown took all estates of which the convicted traitor was tenant in tail, during the existence of all heirs of his body, and of all such of his collateral heirs as would have been inheritable to the estate tail if there had been no attainder; while, on the other hand, all estates in remainder or in reversion expectant upon the estate tail were saved.

(1) Yorke on Forfeiture, p. 82. (2) 32 Hen. 8, c. 36.
(3) Morr. 4728; 1 Cragie & Stewart, 562.

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE. Lord Selborne.

Lord *Campbell* in the House of Lords, and Lord *Ivory* in the Court of Session (1), justly (as I think) deemed the principle of the analogy acted upon in the case of *Gordon of Park* (2) to be applicable to the construction, as to estates of the same nature, of the general untechnical language of the *Succession Duty Act*, which was plainly meant to have a similar and equal incidence upon English and Scotch titles; and that analogy, so far as it is applicable, points as clearly, in the present case, to the determination at which the Court of Session has arrived, as it did in the case of *Saltoun* to the conclusion adopted by the House of Lords.

I therefore agree with my noble and learned friend upon the woolsack that the present appeal should be dismissed.

LORD BLACKBURN:—

My Lords, I also agree that this appeal must be dismissed. The question, as I take it, all turns upon the true construction of the *Succession Duty Act* of 1853; and I think that the only portion of that Act which it is material to look to for the purpose of raising the construction is the 2nd section, which I do not now read, because it has been so frequently and so recently put before your Lordships. Now in that section the Act makes a distinction between the persons who take, upon a death happening subsequently to the passing of the Act, by a "disposition of the property" and those who take by "devolution by law of any beneficial interest in the property"; and the great question which comes first is, what is meant by "devolution by law?" Devolving an estate, or devolution by law, is not a technical set of words either in *England* or in *Scotland;* it is used in this Act, which is meant to apply equally to English and Irish estates and to Scotch estates; probably it was purposely chosen as being a phrase which the law had neither appropriated nor to which it had given any particular meaning, and we have to arrive at its meaning by taking the whole context and looking at the subject-matter, and thus seeing what the words do mean.

Now I think that upon that, it is well, there being a difference

(1) Scotch Cases, 2nd Series, vol. xxi. p. 141.
(2) Morr. 4728; 1 Cragie & Stewart, 562.

between the law of *Scotland* and the law of *England*, first to see what that difference is. In *England* a person who is seised in fee-simple of an estate can settle it in a particular line of succession *per formam doni*, or upon a particular class of heirs, but he cannot settle it in any succession which he likes; it must be confined to a class of heirs known to the law. A man might, and may still, settle his estate upon *A.* and the heirs of *A.'s* body. He may, if he likes, settle it upon *A.* and the heirs male of his body, which would be a different line of succession; he would by that form of gift make the succession to heirs male, to the exclusion of daughters, or those claiming through daughters; or if he pleases (which is very rarely done), he may settle his estate upon *A.* and the heirs female of his body, excluding males. All these would be inheritances which the law would recognise, and therefore an English donor of an estate might give it to a donee and the heirs in that particular line of inheritance which he might select. But in *England* he cannot make a line of inheritance of his own; he cannot say, "I will give the estate to *A.*, and I desire that *B.* shall be considered as *A.'s* heir." He may grant it to *A.* and the heirs of his body, and he may say, "after that estate comes to an end by the dying out of the issue of *A.*, it shall go to *B.* and his heirs;" but that is not by making *B.* heir to *A.*, but by making the person who is to come in afterwards a fresh *stirps*, as was said in *Lord Saltoun's Case* (1), making him come in as the remainderman.

Stopping there, and without at present saying what are the differences in Scotch law, what does "devolution" mean in such a case as this? I can put no other meaning upon it than this, that where the estate has come into the line in which the person is heir, and has come either to *A.* or to some one who is the heir of *A.*, so that it begins in that line of inheritance, then as soon as by death that estate devolves according to the law of inheritance, a devolution happens at that time. That is the only meaning which I can put upon the word "devolution," as making common sense, or being what I think the word must mean. If the estate devolves by death on that person who is heir, if it is held in fee simple, it devolves upon the death of the owner in fee simple on the heir,

(1) 3 Macq. 659.

H. L. (Sc.) 1878 — EARL OF ZETLAND v. LORD ADVOCATE. — Lord Blackburn.

who, according to the general rules of law, would be the heir to the estate, the general heir. If the estate has been settled, as it may be in *England*, to a man and the heirs of his body, then when the person who is seised of that estate tail dies, it devolves upon the heir of the body, or if it be the heir male, it devolves upon the heir male of the body, or if it be the heir female, it devolves upon the heir female; but in each of these cases it devolves according to the line of succession *per formam doni*.

Now in *Scotland*, as I understand the law, the person who is settling the estate can both do more and do less than he can do in *England*. He cannot, as I understand, cut it down to an estate tail; he leaves a fee to the man and his heirs, fettered and restricted by proper irritant and resolutive clauses, but still each successive person who takes, takes the fee subject to the restrictions; he is, therefore, not able to cut it down quite so much as he would do in *England*. Practically it comes to very little difference (except as to the power of alienation, which is another matter) whether a man has the fee simple without any power to alienate, and it must go in a particular line of succession, or whether he has it as an estate of inheritance limited to that particular line of succession. However, there is a technical difference there; and further than that, as I take it, the Scotch donor has power to make such provision by heir as he pleases. I have said that in *England* a man may leave his estate to an heir in any particular class of inheritance, but that he cannot make a stranger another man's heir; he must make the stranger a remainderman. In *Scotland* he may make that person an heir of provision, and consequently he is not a remainderman, but he comes in as an heir of provision. Now it was upon that, as I understand, that the difficulty arose in *Lord Saltoun's Case* (1). There Lady *Saltoun* had settled the estates upon her grandsons; one was Lord *Saltoun*, who died without issue; another was Major *Fraser*, who afterwards became, and is the present Lord *Saltoun*. The first Lord *Saltoun* came into possession, and then he died after the Act; and the question in controversy was, did the present Lord *Saltoun*, Major *Fraser*, who was named, come in by devolution as heir of provision to the first Lord *Saltoun*, or

(1) 3 Macq. 659.

did he come in as taking a remainder, taking a fresh estate as we should call it in *England*, an estate by purchase or remainder direct from Lady *Saltoun?* That made a difference in the rate of duty to be paid. Now the majority of the Court in *Scotland*, acting upon the principles of Scotch conveyancing law, said, "This is a devolution, and cannot be anything but a devolution, for Major *Fraser* comes in as heir to Lord *Saltoun*, having been made heir by the provision of Lady *Saltoun*, who settled the estates." When it came to this House, I do not understand that that was found fault with, or that it was said that that would not be so if it was a question only of Scotch law; but it was said in substance:—"The Act is an English Act as well as a Scotch Act; it is intended to make the estates in *Scotland* and the estates in *England* subject to the same duty, and inasmuch as in *England* it is quite clear that if Major *Fraser* had been named he would have been a remainderman coming after the expiration of Lord *Saltoun's* estate tail, and not an heir of Lord *Saltoun*, we must construe the Act by analogy to the well-known case of *Gordon of Park* (1); we must construe this Act as meaning that such a named substitute, the first of a new *stirps*, shall be exactly in the same position as the remainderman would be in *England*, that is to say, he shall take from the donor by disposition, and not by devolution from that person." That is convenient unquestionably. That point has been decided, and we cannot pass from it: it seems to me to be a decided point.

We come now to what is the question in the present case. I cannot find that there is any difference between English and Scotch law. In the present case, when the last Earl of *Zetland* died, he being at that time seised according to the Scotch law, having the estate in fee in him, but subject to restrictions and clauses resolutive and irritant, and other restrictions, which prevented him from alienating it, and at the same time made his nephew, the present Earl of *Zetland*, his heir by provision—when he died surely in every sense of the word the estate devolved, fell on to his nephew. One cannot see how it would be otherwise than a devolution. The argument, as far as I can make it out (I put it in my own words), is this, that where you give

(1) Morr. 4728.

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE. Lord Blackburn.

an estate to *A.* and the heirs of his body, it is a disposition in favour of *A.*, the first taker, in which I agree, and then it is said: "When *A.* dies it is a disposition in favour of his heir, and when that heir dies it is a disposition in favour of the next heir, and so is a series of dispositions." But I do not think that either in *England* or in *Scotland* that argument would be tenable for a moment. In *England* it is an estate of limited inheritance; in *Scotland* it is an estate of absolute inheritance, but subject to restrictions against alienation and otherwise which practically very much cut it down—but in either case the person takes by devolution as heir.

Then comes the next question, which turns upon the last few lines of the section; it is said in that section that there shall be a succession to "the person entitled by reason of any such disposition or devolution," "and the term 'successor' shall denote the person so entitled." It is quite clear that the Earl of *Zetland* is the successor. According to my view of the matter, it is quite clear that he takes by devolution. The clause then says, "and the term 'predecessor' shall denote settlor, disponer, testator obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." That brings us to a question which does not seem to have been raised in the Court below (I suppose because upon the Scotch principles of conveyancing it seemed so self-evident), namely, whether or not this estate coming to the Earl of *Zetland* in devolution, it can be said that his interest is derived not from the person last possessed of the estate in fee, but from the first institute, or from the first Earl of *Zetland* who has taken it from the first institute; it matters not whether it was he or his father, in which case, if the estate was derived from that first person, the Earl of *Zetland* would take as a lineal descendant, whereas if he took it from the last heir he would take as succeeding to a person by reason of whom he would pay a higher rate of duty. Now, upon that, is there a difference in the first place between *England* and *Scotland?* No, I think that there is not in that respect. There is a statement by Lord *Wensleydale* in *Lord Saltoun's Case* (1) which startled me when I first read it. Lord *Wensleydale* certainly did state that,

(1) 3 Macq. at p. 685.

in *England*, when you had an estate tail, the person who took as heir would derive his title from the first donee of the estate tail, and Lord *Wensleydale* was in general so very cautious and accurate in his statements, even when they were not upon the exact point, that it made me think that when he said it it must be so. But upon looking at the authorities, that I think is not so at all. Whilst actions real existed, the forms of pleading required that the matter should be stated with great accuracy on the record. The count in formedon first shewed that an estate tail was created in a donee and the form of the gift. It then traced the devolution of the estate to the person who was last seised in time of peace of that estate *secundum formam doni*. Then the claimant had to shew title in himself as heir *secundum formam doni* to that person who was last seised. If he was his heir, he was of course heir also to the first donee; but he did not make title in that way. In *Coke's* Entries, Lord *Coke* describes the different precedents as formedon by son and heir, nephew and heir, or cousin and heir (*scilicet* of the person last seised), never as formedon by the great-grandson and heir of the first donee.

The authorities for this, in addition to *Coke's* Entries, are to be found in *Buckmere's Case* in the 8th part of *Coke's* Reports, p. 86, and in *Fitzherbert's Natura Brevium*, and in *Comyns'* Digest, title "Pleader" (3 E 2). They are uniform upon it. He took as heir *secundum formam doni*, as we should say in *England;* in *Scotland* he takes as heir of provision. When once you have got that, it is precisely the same in both countries; he comes in, because the donor, the original settlor, had the power to a certain extent (more extensive in *Scotland* than in *England*) of saying who shall be the provisional heirs, and who shall be the heirs *per formam doni*. He who takes as heir under such circumstances as those, derives his title from the last person possessed, and consequently the amount of duty which he has to pay must be regulated according to his blood relationship to that person, and it seems to me obvious that this must have been the intention and wish of the Legislature; for, taking the ordinary case of a man purchasing an estate either in *England* or in *Scotland*, and making no particular settlement about it, but dying leaving two sons, the eldest son of course takes it;

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE. Lord Blackburn.

the eldest son dies leaving a son, that eldest grandson therefore takes it; then if the eldest grandson dies without issue, it goes to the uncle or the uncle's son; it is obvious that the succession duty there would be regulated by that uncle, or that uncle's son, succeeding as cousin and heir or uncle and heir to the person last seised; he would succeed as heir to the person last seised, because he was the son and heir of the original purchaser, of the grandfather, who upon the supposition had bought the land, but he would pay duty because he succeeded to the heir who was last seised; and I cannot myself see any reason in the nature of things, or any reason, either technical or substantial, why it should be in the least different when the whole of the inheritance is made by provision in the settlement in *Scotland*, or in *England per formam doni*. My own private opinion (which I should perhaps hardly state) is that it is excessively harsh, and not very just, to say that a person who succeeds to his nephew should pay a higher rate of duty than a person who succeeds to his father; I do not much like that notion; but I cannot help thinking that it is not a whit more harsh or unjust to say that a man who succeeds to an entailed estate under a provisional order of succession, and succeeds to his nephew, shall pay an extra duty, than it is to say that he shall pay an extra duty when he succeeds by the ordinary rule of law.

Taking the whole matter, therefore, it seems to me that the decision of the Court below was perfectly right, and should be affirmed with costs.

LORD GORDON:—

My Lords, I concur in the judgment which is proposed to your Lordships, and I think it quite unnecessary to go into the case, which has been so fully sifted and examined. The apparent differences between the law of real property in *Scotland* and in *England*, or the injustice of them, has at all events I think been cleared up very much by the remarks which have been made in the course of the opinions which have been expressed by your Lordships. I will merely say that, as regards the decision of this case, I approve and adopt very much the views of the Lord

President in the Court of Session; and, further, that I think that the decision in the case of Lord *Saltoun* (1) must be regarded as a ruling decision in this House. Therefore it is unnecessary to say more upon the case.

H. L. (Sc.) 1878 EARL OF ZETLAND v. LORD ADVOCATE.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, Feb. 12, 1878.

Agents for Appellant: *Frere & Co.*
Agent for Respondent: *Solicitor for the Inland Revenue.*

[HOUSE OF LORDS.]

JOHN LANG . . . . . APPELLANT;
KERR, ANDERSON, & CO. . . . . RESPONDENTS.

H. L. (Sc.) 1878 *Feb.* 26, 27,

Glasgow Police Act, 1866 (29 & 30 *Vict.* c. 273)—*Obligation to fence tidal and navigable River—Riparian Proprietor.*

By the *Glasgow Police Act*, 1866 (29 & 30 Vict. c. 273), section 384, the Master of Works may by notice "require any proprietor or occupier of a land or heritage" within the city, "to fence the same, or repair any chimney-stalk or flue, or chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous":—

Held, affirming the decision of the Court below, that the statute gave no power to the Master of Works in *Glasgow* to compel a riparian proprietor to fence his land off from a tidal and navigable river, although a right of way gained by the public along the river bank, and fenced on the land side, was alleged to be insecure and dangerous, on account of the proximity of the river.

ON the 23rd of February, 1875, the Master of Works in *Glasgow* gave notice, under the 384th section of the *Glasgow Police Act*, 29 & 30 Vict. c. 273, to Messrs. *Kerr, Anderson, & Co.* (the present Respondents), that the lands and heritages of *Barrowfield*, of which they were "Proprietors" within the meaning of the Act, were in an insecure and dangerous condition, and not properly fenced; and he required them to put up a wooden fence along the north bank of the River *Clyde*, as far as their property extended.

(1) 3 Macq. 659.

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co.

Messrs. *Kerr, Anderson, & Co.* are the representatives of Mr. *Monteith*, of *Carstairs*, the proprietor of *Barrowfield*, a property which is bounded on the south by the River *Clyde*, and extends from *Rutherglen Bridge* eastwards for 470 yards, being occupied chiefly by manufacturing premises. These are enclosed partly by a stone wall and partly by a wooden fence, from the river. On the river side of this fence there is a public footpath running parallel to the *Clyde*, which is divided from the river at some portions of its length by a steep, shelving bank, but at others the path is close to the river brink: under these circumstances the public authorities thought the path ought to be fenced off from the river, to protect the people who use it: hence the notice and order of the Master of Works.

Messrs. *Kerr, Anderson, & Co.* objected to this notice and requisition on the grounds, *inter alia*, that they disputed the power of the Master of Works to make it, and that the fence proposed was unnecessary.

On the 19th of August, 1875, the Procurator-fiscal, Mr. *Lang* (the present Appellant), for the public interest, presented a petition to the Dean of Guild of *Glasgow*, narrating the notice of the Master of Works, and the objections of Messrs. *Kerr, Anderson, & Co.* The Dean of Guild decided in favour of the Procurator-fiscal.

No record was made up in the Dean of Guild's Court, and that being the case his decision (1), if within his jurisdiction, would be final, and not subject to review. Messrs. *Kerr, Anderson, & Co.*, therefore, on the 13th of June, 1876, presented a note of suspension and interdict to the Lord Ordinary (2), praying that the Procurator-fiscal should be interdicted from carrying out the order to erect the fence. The Lord Ordinary having confirmed the Dean of Guild's order, Messrs. *Kerr, Anderson, & Co.* reclaimed, on the 22nd of June, 1876, to the First Division, and during the hearing of the case a joint minute, substantially as follows, was lodged:

The lands of *Barrowfield* mentioned on record, and lying along the north side of the river *Clyde*, bear in the title-deeds to be bounded on the south by the river *Clyde*. A river wall at one time extended continuously along the whole river

(1) Sect. 277, *Glasgow Police Act*, 1866. (2) Lord *Rutherfurd Clark*.

frontage of the complainers' property, from *Rutherglen* bridge up the river to its eastern boundary, but has been to a great extent destroyed by the current of the river, although at some places it is still tolerably entire. There is a public right of way along the river on the north side by a footpath. Along the north side of this path there is a stone wall which extends from *Rutherglen* bridge eastward for a distance of 270 yards, and there is a wooden fence along the north side of the said road from the end of said wall to the eastern extremity of the said lands. From *Rutherglen* bridge there is a distance of 37 yards, where the path occupies the whole space between the wall on the north side and the said river wall. And from that point to the eastern extremity of the complainers' property there exists a bank of varying steepness and breadth between the southern boundary of the said footpath and the river. The said road is used only by foot passengers. The roadway has not hitherto been repaired or maintained by the Board of Police of *Glasgow*. The Clyde opposite the complainers' property, and for some miles above the same, is tidal, and capable of being navigated.

The counsel for the parties were subsequently further heard, and on the 1st of June, 1877, the Lords of the First Division (Lord *Deas* dissenting), recalled the Lord Ordinary's interlocutor, and interdicted, prohibited, and discharged, in terms of the note of suspension and interdict, and found the Appellant, Mr. *John Lang*, liable in expenses (1).

On appeal to the House,

Mr. *E. E. Kay*, Q.C., and Mr. *J. B. Nicolson* (of the Scotch Bar), contended, for the Appellant, that the decision of the Dean of Guild was within his statutory jurisdiction. No technical point as to the record not having been made up in the Dean's Court would be raised. Considering the *Clyde* tidal and navigable up to this point, the lands of *Barrowfield* must be held to extend to the water's edge. No distinction could be drawn between that portion of *Barrowfield* on which there were buildings, lying to the north of the Respondent's wall and fence, and that portion of *Barrowfield* lying between this wall and fence and the river.

The first three lines of the 384th section stood alone, and applied to the Respondents. It might be that the powers given to a railway company, and to a corporation were different: *Galloway* v. *Mayor and Commonalty of London* (2); but in reading an Act of Parliament of this kind a liberal construction should be given: *Attorney-General* v. *Mayor of Cambridge* (3). The case of *Lang*

(1) 4th Series, vol. iv. p. 779.
(2) Law Rep. 1 H. L. C. 34, 45.
(3) Law Rep. 6 H. L. C. 303.

H. L. (Sc.) 1878 ~~ LANG v. KERR, ANDERSON, & Co.

v. *Bruce* (1) bore on this case. No one but the Respondents could erect this fence.

[LORD CAIRNS, L.C.:—The Respondents have fenced the road on one side—on that side where they have buildings—are they obliged to fence it also on the other, and thus shut themselves out from the river, which is here tidal and navigable?]

The reasonableness or unreasonableness of the statute is not to be looked at. The Respondents allowed the public to gain a right of way, and therefore a power was given to protect the public from danger. No use had been made of the bank in connection with navigation, nor was it likely there would be, owing to the steepness of the bank. There was no public right on the bank of a public navigable river, which would prevent the erection of this fence: *Ball* v. *Herbert* (2). The acquisition of the right of way did not affect the question of property; the ownership of the *solum* remained the same: *Galbreath* v. *Armour* (3). See also Lord *Stair's* Institutes (4), and *Erskine* (5), where the inherent right of the proprietor of the *solum* in the banks of even a public navigable river is nowhere called in question. Regarding the *Clyde* as a public river, of course it could not be in any sense a land or heritage of which the Respondents were proprietors, but the *Clyde per se* could not be considered as a dangerous subject, but it was its proximity to that part of the Respondents' land over which the public had acquired a right of way which constituted the danger. The quality of danger must, therefore, be held to have attached itself to the land so used by the public. The Respondents could not relieve themselves from the statutory obligation to fence, by saying that the fulfilment of the obligation would have the effect of fencing the lands of a conterminous proprietor; and that the ultimate origin of the danger was caused by something extraneous to their property.

The Lord Advocate (6), and Mr. *Benjamin*, Q.C., were heard for the Respondents, and maintained that the Dean of Guild had no jurisdiction in this case. The subject here was not "a land or

(1) 11 Macph. 377 (1873, Feb. 5th).
(2) 3 Durn. & East, 253, 261.
(3) 11 July, 1845, 4 Bell's App. 374.
(4) B. 2, tit. 1, sec. 5.
(5) B. 2, tit. 1, sec. 5.
(6) Right Hon. *W. Watson*, Q.C.

heritage" within the meaning of the *Glasgow Police Act.* The term "lands and heritages" is by the interpretation clause of that statute to have the meaning attached to that expression in the Valuation Acts (1), and the term a "land or heritage" is declared to mean one of such lands and heritages separately valued, or entered in the valuation roll as separately occupied; but by the 42nd section of the *Valuation Act,* 17 & 18 Vict. c. 91, the term, "lands and heritages" is defined as extending to and including a variety of subjects, among which neither a road nor a river is included. Therefore the power given to order a proprietor to fence his land or heritage, could not warrant an order to fence the north bank of the *Clyde.* The Appellant, to make good his contention, assumes that the land and heritage separately valued and occupied are in effect the whole of the property of *Barrowfield* down to the water's edge; but the occupied and beneficial portion of *Barrowfield* was that lying to the north of the roadway, and that was already fenced off from the encroachment of the public. If the Legislature intended to impose on riparian owners the burden of erecting a fence along the tidal and navigable river *Clyde,* an express declaration to that effect would be expected. And such a power would not be looked for in a division of an Act devoted to repairs of buildings. There was not one word in the whole Act as to fencing the *Clyde.* As to having a right to the surface of the road, see *White* v. *Buccleugh* (2).

In *Lang* v. *Bruce* (3) the owner of the canal was required to fence the road, because the canal was his property and the subject which caused the danger; though the danger existed on the road which ran by the side of the canal. Here the *Clyde* was the cause of danger, and the Respondents, who could not be said in any sense to be the proprietors, were directed to fence it. Even taking the order to be one to fence the lands off from the river, it would be extravagant and absurd to hold that the statute authorized an order on a proprietor to fence his private property off from a *public* river. The piece of land between the road and river was as much the right of the public as the road was, and the Respondents had no right to shut out the public from a tidal and navig-

(1) 17 & 18 Vict. c. 91, and 20 & 21 Vict. c. 58.

(2) Law Rep. 1 H. L., Sc. 70.

(3) 11 Macph. 377 (1873).

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co.

able river. What was really asked here was to deprive a riparian owner of access to a navigable river, which was one of the most valuable rights connected with the enjoyment of his property. When the public either receive or take a right of way, they take it just as they get it; and their act of assuming a right of way cannot conceivably give rise to any obligation on the part of the person from whom they take it. The decision below, therefore, ought to be confirmed.

Mr. *Kay* was heard in reply.

The following opinions were delivered by the Law Peers:—

LORD CAIRNS, L.C.:—

My Lords, the Respondents in this case are the proprietors of property in the city of *Glasgow* which extends along the north bank of the *Clyde* from *Rutherglen Bridge* eastwards for about a quarter of a mile. On a considerable part of that property, there are buildings consisting of houses and manufactories, and along the north bank of the river there is a public road for foot-passengers. I say along the north bank of the river, but in strictness the road should be described thus: it is a road upon a part of the bank of the river which is level, and it would appear that where the bank slopes down into the river, and where, consequently, no foot-passengers could walk, the right of roadway does not prevail, and that sloping bank must be considered to be the property of the Respondents unaffected by any right of way. That being the character of the property of the Respondents, I have only to add that between this public roadway and the rest of the property—that is to say, upon the north side of the roadway—there has been erected by the Respondents, or those whom they represent, a proper and substantial fence; along one part of their property a wall, along the rest of their property a fence of another description. That fence, therefore, separates the roadway to which I have referred from the part of the Respondents' property on which the buildings are situated.

My Lords, that being so, the Respondents were called upon by an officer under the municipality of *Glasgow*, who is called the Master of Works, to put up a fence upon the extreme south side

of the property which I have described and immediately along the bank of the River *Clyde*. So far as your Lordships have that notice given by the Master of Works before you it was in this form; it stated that the north bank of the River *Clyde*, in connection with the lands and heritages of which the Respondents were "proprietors" within the meaning of the *Glasgow Police Act*, which I shall have to refer to, situated at or near, and extending from, *Rutherglen Bridge* eastwards as far as their property extended, was in an insecure and dangerous condition, and was not properly fenced; and the notice required them, within ten days thereafter, to put up a wooden fence along the north bank of the River *Clyde* as far as their property extended not less than 4ft. 6in. high, with a double railing on the top, and fastened to the bank in accordance with instructions given by the Master of Works, and to do that to his satisfaction. My Lords, it is admitted on both sides that if there was authority to require that fence to be put up, your Lordships have nothing to say to the character of the fence. The Master of Works, subject to an appeal to the Dean of Guild, is the absolute judge of the character of the fence; he might order it to be of a greater or less height, or of a more or less substantial description.

Now, my Lords, the question arises, What was the authority of the Master of Works to require this fence to be put up? That authority is said to be found in the 384th section of the *Glasgow Police Act* of 1866 (1). My Lords, that 384th section occurs in what is called the 27th division of the Act. The Act is an extremely long one; it consists of 416 clauses. The provisions are of the most varied kind, and I may observe that a number of the provisions—in fact, I may say the greater part of them—are provisions which more or less interfere with the ordinary rights of private property. They are, doubtless, very valuable and proper provisions, otherwise Parliament would not have enacted them; but interfering, as they do, with the rights of property, the owners of that property are entitled, of course, to have these provisions very carefully examined, in order to prevent any undue or arbitrary exercise of the powers given by the Act.

The 27th division of this long statute is headed in this way,

(1) 29 & 30 Vict. c. 273.

H. L (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Cairns, L.C.

"Buildings, their erection, alteration, and use." And, my Lords, I may observe that these headings in this Act are not to be looked upon as marginal notes inserted, perhaps, not by Parliament, but by the printer, because they are referred to in the body of the Act itself. The 386th clause itself takes notice of the headings of different parts of the Act, and shews that Parliament had carefully and analytically divided the Act into those different parts. The 384th section is, as I have said, in the part which relates to "Buildings, their erection, alteration, and use;" and, my Lords, that part, extending from sect. 364 to sect. 386, has reference in, I may say, every section of it, to buildings in some shape or form.

The 384th section is in these words:

> The Master of Works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a Land or Heritage to fence the same, or repair any Chimney Stalk or Flue, or any Chimney-Head or Can, or any Rhone, Signboard, or other Thing connected with, or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction.

My Lords, with regard to the words "proprietor or occupier of a land or heritage," your Lordships have to take them in connection with the interpretation clause. The interpretation clause provides that in the Act these and other similar words "shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction." And then "lands and heritages" are defined to mean "lands and heritages within the city," and they are to "have the meaning attached to that expression in the Acts for the valuation of lands and heritages in *Scotland* in force for the time being" (1); and then the interpretation clause says that "land or heritage in the singular number shall mean one of such lands and heritages separately valued or entered in the valuation roll as separately occupied."

Now, my Lords, in this case I think your Lordships could have no doubt, looking at that clause which I have read, and at the other clauses which have been recently read to your Lordships, that *à priori* the intention of these clauses in this Act would naturally be taken to be to give to the municipal authorities of *Glasgow*

(1) 17 & 18 Vict. c. 91, s. 42, and 20 & 21 Vict. c. 58.

a power, which was a very valuable and probably a necessary power in any city of the kind—to require a separation to be made, if necessary, between what is public and what is private—between a piece of ground on which buildings or other works may be going on and a street, the persons passing along which should be kept from intrusion upon the private land. With regard to the Respondents there can be no doubt—indeed it follows from what I have already said—that so far as their occupation is concerned, above all so far as their beneficial occupation is concerned, that occupation is entirely confined to their property of *Barrowfield*, north of the roadway, which I have described. Their property, as regards their beneficial occupation, terminates where the roadway begins, and from the roadway across to the *Clyde*, including the sloping bank I have referred to, there is no beneficial occupation whatever at present, and there is not said to have been any beneficial occupation on the part of the Respondents. Therefore, looking at the matter *à priori*, any person, I think, knowing that municipal regulations were to be made with regard to property of this kind, would naturally say that what would be desirable would be that property so circumstanced should be fenced where the beneficial occupation terminated, and that if there was to be a fence towards the south side of this property at all it should be a fence interjected between that which was the subject of private occupation and the public road I have referred to. My Lords, in point of fact that is exactly where the fence has been put up, and no complaint has been made of that fence, and no allegation has been made that it is insufficient. There being now a perfect and sufficient fence between the part of *Barrowfield* which is occupied beneficially, the part of *Barrowfield* where any buildings are found, and the road, what your Lordships have now to consider is, upon what footing is it that a claim is made to have a second fence put up parallel with the first, further to the south, and including within it the public road in question?

My Lords, that raises the question, was it intended by this 384th section that, there being a piece of land well and properly fenced up to the place where the beneficial occupation ceases, and there being then along that piece of land, outside of it, a public road, was it intended that that public road should be treated as

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & CO. Lord Cairns, L.C.

"a land or heritage" within the meaning of this section, or, was it intended that the existing fence at the end of the ground beneficially occupied should be wholly disregarded and the owners called upon to make a second fence at the outside of the public road, as if the internal fence had never been placed where it is? Now, my Lords, I cannot persuade myself that either of these things was the intention of the Act of Parliament. It appears to me that, if in the first instance the owners of *Barrowfield* had been called upon to put up a fence where it has been put up, it might have been very difficult to say that that was not a reasonable demand, and one which they ought to have complied with; but whether that was so or not (upon that I do not desire to offer any distinct opinion), the fence has been put up there, and I am unable in that state of things to see that there can be now a right on the part of the municipality to call for another fence to be put outside that which is a public road, and in respect of which there is no beneficial occupation whatever of it by the Respondents as "a land or heritage" producing any profit or rent to them.

My Lords, I think that those considerations are very much strengthened by looking at the natural meaning of the words as they occur in the clause, namely, "the Master of the Works may" "require any proprietor or occupier of a land or heritage to fence the same." The natural meaning of those words is that the Master of Works may call for a fence, in order to make a division which shall exclude the public or the owners of some other property from the property the owners of which are called upon to put up the fence. But the purpose for which this fence is called for is not a purpose of that kind at all; it is called for for the purpose of fencing and keeping in the public, and not for the purpose of keeping them out and dividing them from the property. It is, as was candidly admitted, a fence the whole purpose and object of which is that when the public are passing along this road they may be protected from falling into or straying into the waters of the River *Clyde* and thus coming into danger. Now it appears to me that that is not a purpose for which any fencing under this section was intended. It was not intended for the purpose of protecting and keeping inside those persons who had got into a heritage; it was for the purpose of excluding from the

heritage those who were outside; for keeping those who were outside from going into it. Therefore, whether it be viewed in the one light or in the other, whether as regards the purpose for which the fencing was intended in this section, or as regards the land or heritage being already fenced up to the end of the beneficial occupation, in either view I think the fence which the Respondents have been called upon to make here is one the demand for which is in no way warranted by this 384th section.

That, my Lords, was I think in substance the view taken by the majority of the learned Judges in the Court below, but I do not wish to leave the case without making one further observation. The property of *Barrowfield* is a property, as I have already said, lying along the banks of the River *Clyde*, that great navigable and most important river upon which the city of *Glasgow* is built. Now, my Lords, it is not necessary in the view which I take of this case to decide the question, but if there had been no fence at all upon the northern side of this road, and if the question were now to be raised for the first time, upon a simple demand by the Master of Works that a riparian proprietor like the Respondents should interject a fence parallel with the River *Clyde* separating between the *Clyde* and the heritage of that riparian proprietor, I own that I should require very much consideration and very considerable argument to satisfy me that that was within the power of the Master of Works under this Act. There is no doubt that there is a great similarity between the case of a water highway, a public navigable river, and a road (1). I can see, however, in this Act the most careful and elaborate provisions with regard to roads, with regard to their repair, their protection, their making, their maintaining, their fencing, and their government in every way, but I can see not one word in this Act from beginning to end with regard to the River *Clyde*, that is to say, as subjecting it to the jurisdiction of the municipality having powers under this Act. Therefore I should be very slow to come to the conclusion that powers were indirectly to be evolved out of this Act, the result of which would be that you might imagine that the Master of Works, with no control over him but that of the Dean of Guild, might require the erection by the riparian proprietors along the *Clyde* of

(1) See *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839.

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Cairns, L.C.

a continuous fence, which according to his discretion might be more or less large and substantial, between the riparian tenements and the river itself. My Lords, I only desire to say that I should wish that point to be kept under consideration, and that it should not be supposed that it has been overlooked in the present case. I do not think it necessary to say more than that I entertain very great doubts whether in any case such a power is under this Act to be deduced in favour of the Master of Works.

My Lords, upon the other grounds which I have endeavoured to explain, it appears to me that the decision of the majority of the Court below is correct, and I move your Lordships that the interlocutor should be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY :—

My Lords, in this case I entirely concur in the view which has been expressed by my noble and learned friend on the woolsack, with reference to the conclusion at which your Lordships ought to arrive upon the appeal now before you. And we are glad to find that the opinion so expressed concurs with that of the majority of the learned Judges in the Court below.

[His Lordship having stated the facts of the case, continued :—]

My Lords, if this case be within the clauses of the Act to which I will immediately refer, then it is conceded on all sides that your Lordships are not in a position to deal with the question of whether or not the road be dangerous; because it is admitted that, if the notice given be within the four corners of the *Glasgow Police Act*, the Dean of Guild is the person who has, so far as this House is concerned, the exclusive jurisdiction of determining the degree of danger and the necessity for fencing. The question therefore is reduced to this: whether or not in this state of circumstances there can be found in the Act of Parliament an authority given to the Master of Works to serve a notice upon the proprietors of *Barrowfield*, compelling them, after they have erected a fence fencing off the limits of their occupied property from the public road in question, also to erect another fence on the other side of the road on the limits in one sense of that property, because their property is said to extend to the river, subject only to this right

of road over it. In that sense, and in that sense only, is it their property, and the question is whether they can be compelled to put up that second fence in consequence of the state of the public footway which is occasioned, as is admitted, mainly by the current of the River *Clyde*?

Now, my Lords, the first thing that strikes us in the Act of Parliament, before referring to the particular clause under which the notice purports to be given, is this—There is the River *Clyde* and there is this pathway; and one does not find any provision whatever made from the beginning to the end of the Act with reference to the River *Clyde* beyond, I think, a clause saving the rights of the *River Clyde Commissioners*, a public body appointed under this or a previous Act of Parliament. That is strange, the subject-matter being such as has been described. Now, this road is not a small one—it is a good many yards in length. The *Clyde* existing, and this roadway existing, although the Act of Parliament takes very great pains in its numerous divisions and subdivisions to deal with every matter which Parliament thought important to place under the particular jurisdiction under which these matters have been placed, and although the Act contains numerous provisions with regard to roadways and ways of every description, yet it does not contain a single provision with regard to the *Clyde* or to this roadway. Now, one certainly would have expected, considering that the *Clyde* extends through a large portion of the limits of the Act, to have found some notice taken of that river if it was contemplated that anything was to be done in respect of it. Care is taken to make provisions as to the formation of streets, as to the dealing with ruined houses, as to needful repairs to be done in the houses and the streets, and so on, but there is nothing about the River *Clyde*, except a saving clause as regards the *River Clyde Commissioners*.

Then, my Lords, what we have to look to is the clause under which the Appellant professes to be entitled to call upon the proprietors of *Barrowfield* to do what he has asked them do. He has asked them in a certain sense to repair the damage which has been done by the current of the River *Clyde* to that ground which forms the substratum of the footway by substituting for a wall which formerly existed there a wooden fence along the north

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Hatherley,

bank of the River *Clyde* as far as their property extends, to the satisfaction of the Master of Works. It was to be a solid and substantial fence between the *Clyde* and the public road used by foot passengers. The clause on which the Appellant relies in giving that notice is the 384th.

Now, my Lords, the first observation which occurs upon that clause is one which has been made already by my noble and learned friend on the woolsack, and it is this: the clause is found in a strange part of the Act, if it be really one which is applicable to the case now before us. We have not before us the case of any house or any building whatever, beyond the wall or fence which the Respondents are asked to build, and we find that the provisions of the Act are carefully divided into several parts or divisions, those parts or divisions being parts of the body of the Act itself, and not mere marginal notes.

This particular provision is not found in the one of those divisions in which we should expect to find it if it applies to a roadway—the division which is contained in the Act with reference to the making, improving, and maintaining of streets and courts. There is an express division for that, but this section is found in a later division than that—it is a division entirely relating to the erection of buildings and houses.

The next thing to be observed is this; not only is the 384th clause found in that division, but it is found in the part of the Act which expressly relates to houses in a bad state of repair, and to waste or ruinous properties. I refer to the series of clauses beginning at the 381st and going on to the 384th. The marginal note of clause 381 is this—I only read it to shew the subject matter dealt with in that portion of the Act—"Dean of Guild may order dangerous buildings to be taken down or secured." That clause enacts that a report may from time to time be ordered to be made about a building which appears to be dangerous, and that the proprietor may be ordered to take down or to secure or repair such building, or a part of the building, if it is reported to be dangerous. Then, the 382nd section provides a penalty against any person allowing buildings to remain in that state, and not complying with an order of the Dean of Guild. In the 383rd section care is taken to provide for the case of waste or ruinous

properties; provision is made for any cases where it cannot be found out who the proprietors are, and for cases where the proprietors are unable or unwilling or delay to agree to repair or rebuild the ruinous building; then the proper authorities under the Act may take steps to have the property or a sufficient part of it sold, or they may take such other steps as they think proper for the purpose of removing that danger.

Immediately after those three clauses relating to dangerous buildings comes the clause in question, the 384th (1). Now, I do not read that section as importing that the first part of the clause necessarily has reference to a dangerous building, but at the same time that it applies to some building or other, is what, I think, one would clearly expect from the division of the Act in which it is found. However, I am willing to take it, for the purpose of expressing my opinion upon the meaning of the Act, that the Master of Works, whilst he is looking out for a dangerous building, if for any reason whatever thinks it necessary that a fence should be put up, may proceed to direct such a fencing, and he has power given to him in the Act for that purpose.

Then, at the end of this division of the Act which is appropriated distinctly to buildings, we find a clause which covers the same ground as the preceding division of the Act, which relates to streets and courts. I refer to a clause which was read by my noble and learned friend on the woolsack just now, the clause which says that all the provisions contained in the Act under the head of streets and courts, with reference to the particulars to be stated in the notice and the other proceedings, shall also apply to this division of the Act with reference to notices which may be given by the Master of Works. This shews as distinctly as possible that they were two substantial sub-divisions of the Act. Accordingly, any person with any ordinary appreciation of the intention of the Act of Parliament would suppose that he would be likely to find a remedy, for the particular case of grievance set up by the Appellant with regard to the public footway injured by the devastations of the River *Clyde*, in the division of the Act which relates to streets, roads, and ways which are dangerous or unfit for passengers. But it appears that the clause under which

(1) See *ante*, p. 536.

(H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Hatherley.

the Appellant has taken upon himself to act is to be found only in the division of the Act which relates exclusively to erecting, repairing, or taking down buildings, houses, and the like. Therefore, my Lords, I think that shews in a very strong manner that the parties who set the powers of this Act in motion were conscious that they could not find in any other part of the Act, except the 384th section, that power which they gave notice of their intention to exercise. And when you come to read that section, and read it in connection with the portion of the Act in which you find it, it is impossible to say that it can be applied to a case in which, a public road being already fenced off as between the public and the proprietor, he is also required to fence off, not the general public, but the river—that is what it comes to—for fear that the public should get into the river, and that mischief and danger should be occasioned in consequence of the state of the banks caused by the current of that river. It appears to me that that is an application of the Act which it is impossible for your Lordships to adopt.

Now, with reference to the mode of assessment, it is very remarkable, in the first place, that the notice under the 384th clause is directed to be given to the proprietor of "a land or heritage;" and "a land or heritage," in the singular number, is defined by the interpretation clause to mean a land or heritage "separately valued or entered in the valuation roll as separately occupied," which certainly has not any application, as it appears to me, to this particular case, in which the Appellant can only make good his position and support his contention by assuming that the land or heritage separately valued is in effect the whole of the property of *Barrowfield* extending down to the water's edge, and by saying that this authorizes him to require a fence or hedge to be placed in such a way as to separate the whole property of *Barrowfield* from the actual waters of the river, up to which waters, subject to the right of way over the roadway, the Respondents hold the property. My Lords, I cannot conceive that that can be the true and proper construction of this Act. We have no very distinct evidence before us as to how these lands are valued or entered in the valuation roll, but I think we cannot assume that in that valuation roll there would be entered as a separate heritage this road which pro-

duces no revenue whatever. Now, as regards private streets, we find in clause 40 a provision for the assessment of adjoining lands, but it is confined to the particular purpose of cleansing the streets. Under that clause an assessment may be imposed in certain cases for the purpose of cleansing private streets and courts, which it is said would, according to the interpretation clause, include the sides of the River *Clyde*. Now under that 40th clause it is the buildings, and houses, and property, as distinct from the way over which the public go, which must be assessed, and no one would dream, under that clause, of assessing the whole roadway if the same proprietor owned the land on both sides of it, or up to the *medium filum* if he were the proprietor on one side only. That would not be thought of. Neither would it be rational to interpret the Act as applying to any road in the manner now contended for, because, if that were the case, and you were to take it up to the very verge of the property, of one proprietor on one side, and of another proprietor on the other side, you would require to have a fence set up in the middle of the street in order to separate the two properties. We have not got all the information we might have had as to how these assessments are made, but in interpreting this Act we cannot consider the fencing of property to mean as separating that property which the person assessed occupies from his neighbour's land which he does not own or occupy. Where there is a solid reason for a fence being put up between the proprietor and the public—where, as in this case, the public have a right of way, and it is necessary for the public to be kept out of the property by means of a fence, and the proprietor and all whom he employs to be kept out of the public way by means of that separation—if, as in this case, that has been done, I apprehend that the property really is effectually fenced.

Therefore, my Lords, in the first place, I rely strongly on such an important highway as the *Clyde* not being mentioned in any way whatever in the Act; in the next place, I rely upon the jurisdiction which is expressly bestowed with regard to streets and ways in a division of the Act which, by the admission of the Appellant, contains no clause which can be read as applicable to this particular point; and, thirdly, I rely upon there being no house or building whatever on the property now before us; for these

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Selborne.

reasons, I apprehend, my Lords, that the case is not brought within the Act; and, that being so, I think the decision of the Court below ought to be sustained.

LORD SELBORNE:—

My Lords, I agree in the conclusion at which your Lordships have arrived; and I prefer to rest my own opinion on the ground that the "fencing" mentioned in the 384th section of the Act is shewn, by the other matters with which it is there and in the next succeeding clause associated, and also by the general heading of the 27th part of the Act (extending from sect. 364 to sect. 386, both inclusive), to which it belongs, and by the 279th section, defining the general statutory duties of the Master of Works (the officer on whom the power of requiring a proprietor to fence his "land or heritage" is conferred), to be *such* fencing as would limit or make secure *the use* of buildings, or appurtenances of buildings, erected or in course of erection upon such land or heritage; and that the powers of the 384th section would be extended to a purpose foreign to that for which they were given, if they were made use of to require the land of a riparian proprietor to be fenced off from the River *Clyde*, on the ground of danger from the river to passengers using a public footway (such as that in the present case) upon the river bank; or on any other ground unconnected with the use of such land for, or as an adjunct or appurtenant to, any building.

I am confirmed in this opinion by the following considerations:— That the Dean of Guild, in cases falling within the 384th section, has a discretion from which there is no appeal; that the part of this Act which relates to streets and courts (under which latter term, as interpreted by the Act, this footway may perhaps fall) contains no provisions justifying the present notice; that there is nothing in the Act giving the local authorities under it any power with respect to the River *Clyde;* and that, if it had been intended to enable those authorities to require the land of a riparian proprietor to be fenced off from the river, this could hardly have been done, consistently with reason or justice, without preserving to him, under proper regulations, his right of access to the river.

This opinion is quite consistent with the decision in the case of *Lang* v. *Bruce* (1).

LORD BLACKBURN :—

My Lords, I also agree in the conclusions to which your Lordships have come.

Mr. *Monteith*, whom the Respondents represent, is the owner of *Barrowfield*, the boundaries of which, according to the titles, run down to the edge of the *Clyde*, which is here tidal and navigable. From time immemorial a public footway was established on the outside of *Barrowfield* along the bank of the *Clyde*. At some period—we are not told when, but a long while ago—a wall was built along the side of *Barrowfield*, just inside the public footway. It was built so that outside that wall which fences *Barrowfield* there is nothing left except the footway itself, and a portion of the bank, which is very steep and broken, extending down to the *Clyde*.

Mr. *Monteith* remains the owner of the *solum* of the footpath, and also the owner of the soil below it down to the *Clyde*. He has both these, subject to the right of the public footway. As long as things remain as they are now, he cannot use the lands in any way inconsistent with that right of public footway, nor can he use the soil of the footway itself, or the portion of ground below which supports it, for any beneficial purpose whatever. That is the state of things as it exists ; it may be altered hereafter.

The question comes to be whether in respect of his ownership of the soil of the path and the bank which supports the path, hampered as I have already said by his not being able to use it beneficially, he can be compelled to move this fence along the side of the footway so as to prevent people falling into the *Clyde*. I say in respect of that ownership, for I take it to be quite clear that if he had sold *Barrowfield* up to the wall which now exists on the inside of the footway, the purchaser of *Barrowfield* would never be liable at all, and that Mr. *Monteith* if he had retained to himself the soil of this footway and bank, would have had just the same liability attaching to him after he had sold *Barrowfield* as he has now. Therefore it is in respect of the ownership of that par-

(1) 11 Macph. 377 (1873); 45 Scot. Jur. 257.

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Blackburn.

ticular portion of land occupied by the footway and the bank that the question arises whether he is liable to make this fence or not.

That question depends upon the construction of a very few words in the 384th section of the Act of Parliament. In that section there is a power given to "require any proprietor or occupier of a land or heritage to fence the same." We have to inquire what is the intention of the Legislature in using the words "fence the same."

Now, I certainly think, looking at it *primâ facie* as regards the intention, when one finds that provision in a class of sections relating to buildings, and indeed in a municipal Act, giving the police power over the municipality alone; where almost all the lands if not already built upon, will be built upon afterwards, one would be apt to say that calling upon a person to fence his property meant to put up a fence which shall act as a protection to hinder those who are going along the highway from coming upon his property. One would not say that it was at all intended that if the highway happened to be, as this particular footway does happen to be, your own property, you were to put up a fence in order to prevent people from going upon your neighbour's land on the other side of the highway; yet that really is what is asked here. Perhaps I have used the wrong phrase in calling the *Clyde* a neighbour's property—I suppose it belongs to Her Majesty, but it certainly is not the property of the proprietor of *Barrowfield*—what he is asked to do is to put up a fence along the extremity of his land so that those who walk along the footpath may not fall into the *Clyde*, which is not his. One would say *primâ facie* that that would not be the purpose for which a fence may be required to be put up under this Act of Parliament; but that the intention, when the Act says that you shall fence your property, would be that you shall put up a fence as between you and the highway; you shall come to the extremity of your property which you beneficially occupy, and put up a fence there. Not that you shall go to the other side of the highway, but that you shall make a fence along the extremity of your land or heritage where it touches the highway.

My Lords, I think that view of the intention of the Act is greatly fortified by seeing how this 384th section is brought into

the class of sections which all relate to buildings, and their erection, alteration, and use. Clearly the person who drew this section was thinking of buildings chiefly, because he put in "chimney-stalk or flue or chimney-head." He did what I think is a very injudicious thing to do in an Act of Parliament, he referred for the meaning of "a land or heritage" by the interpretation clause to another and a different statute not passed with any such object as this. The interpretation clause, sect. 4, says that "lands and heritages within the city shall have the meaning attached to that expression in the Acts for the valuation of lands and heritages in *Scotland* (1). That is quite intelligible. But then he goes on and says, "land and heritage in the singular number shall mean one of such lands and heritages separately valued or entered in the valuation roll as separately occupied." In this 384th section he has put it in the singular number, "require any proprietor or occupier *of a land or heritage*," that is, "require any proprietor or occupier of a land or heritage separately valued or entered in the valuation roll as separately occupied" to fence it.

Now neither side has thought it worth while to bring before us the exact information as to how *Barrowfield* is entered upon the valuation roll. But it is doubtful whether that information would throw much light on the subject. I think the material question to be considered is, could the highway here, the land which cannot be used for any beneficial or valuable purpose, be properly called a part of a subject which was separately valued, or could it be separately valued as a separate subject to be assessed and valued for the purposes for which the valuation roll is made? If it was entered in the valuation roll it would be entered as "land occupied by footway and supports thereof" "no value at all." It would be rather absurd to require that it should be entered in the valuation roll for the purpose of saying that it was worth nothing; and I have considerable doubt whether a public way could be said to be part of "a land and heritage separately valued or entered in the valuation roll."

My Lords, this would not perhaps be of itself a sufficient *ratio decidendi* for construing this Act, but added to the other reasons which lead my mind to the conclusion that the intention was that

(1) 17 & 18 Vict. c. 91, and 20 & 21 Vict. c. 58.

H. L. (Sc.) 1878 LANG v. KERR, ANDERSON, & Co. Lord Blackburn.

the fencing was to be a fencing along the property, where it comes up to a highway where the public would otherwise come in contact with the property, in order to prevent the public from getting into mischief and wandering upon that land, this second consideration very greatly fortifies and strengthens that view of the case.

In saying that the fencing is to prevent persons from going on to the land, I am adopting to a considerable extent, but not entirely, that which seems to have been one of the principal reasons which influenced the learned Judges both in the case of *Lang* v. *Bruce* (1) and in the present case (2). They seem to have laid great stress upon the circumstances that the danger was not upon Mr. *Monteith's* land in this case, and was upon Mr. *Bruce's* land in the other case.

I do not know whether it is necessary to consider it, but I should not like to absolutely say that there could not be an order to fence except where there are buildings on the land. I can imagine a case, which, indeed, I rather think exists in some portions of *Glasgow*, where there is a worn-out quarry which has not yet been built upon. If people were building houses or streets on either side of that quarry, it is not necessary to say that the Master of the Works could order the proprietor of the quarry to put a fence upon it before he began to build; but I should not like to say that he could not. That is a point upon which I am not convinced, but I am quite convinced that the general purview of this enactment was the intention of regulating fencing in places where buildings were going on, and had gone on round about.

LORD GORDON:—

My Lords, I concur in the opinions which have been expressed by all your Lordships. I think it unnecessary to enter into any argument founded upon the provisions of the Act of Parliament. I quite concur in the views which have been expressed with reference to the construction which ought to be placed upon the words of the Act, and the difficulty which the Appellant encounters in endeavouring to support his case by reference to those clauses.

I adopt the view which has been taken by the Lord President

(1) 11 Macph. 377 (1873).
(2) Scotch Cases, 4th Series, vol. iv. p. 779.

and the majority in the Court below, that it was not within the power of the Master of Works to direct that a fence should be erected alongside of this boundary. The Lord President held that the danger to be protected against was the River *Clyde*, and, therefore, the wall or fence must be on the line of the River *Clyde*. That would obviously impose a very serious burden upon the proprietor of *Barrowfield;* because he would have to exclude the river, and might have to build up a very strong defence to exclude any encroachments on the part of the *Clyde;* and not only so, but such fence might, as has been alluded to by your Lordships, have excluded the proprietor of *Barrowfield* from a very valuable interest, a right to obtain access to the *Clyde*. Lord *Deas* seemed to hold that the view taken by the Lord President was not the sound one. I have the greatest respect for the acuteness and ability of Lord *Deas*, but I think he was in error in differing from the Lord President upon the ground which he has stated in reference to this matter. His Lordship held that "somebody must be liable to fence this footpath, and so prevent danger to the public frequenting it;" and his Lordship thought that, as neither the Crown nor the municipal authorities were said to be liable, the liability could only attach to the proprietor of the *solum* of the footpath. But I think it is sufficient for the purposes of this case to say that the statute with which your Lordships are dealing does not impose any such liability, or give power to the Master of Works to compel the proprietor to erect such a fence.

My Lords, I take very much the view expressed by Lord *Mure* and Lord *Shand* with reference to the erection of a fence along the banks of the *Clyde*, which is a navigable river. The question as to property bounded by the River *Clyde* has been before your Lordships, and it has been decided by your Lordships that where the River *Clyde* is the boundary, that excludes the proprietor from any interest in the soil riverward. It limits him to the boundary, which is the River *Clyde;* he cannot go further. The proprietor of *Barrowfield* could not go to the south, and therefore he has no interest in the River *Clyde*, except, I should say, with a view to obtain access to or from his lands.

Upon these grounds, I think that the Court of Session by the majority have properly disposed of this case, and that is fortified

H. L. (Sc.) 1878 LANG v. KEBB, ANDERSON, & Co.

by the views which have been expressed by your Lordships on the terms of this statute. I therefore concur with your Lordships in thinking that the interlocutor appealed from should be affirmed.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, February 27, 1878.

Agents for Appellant: *Simson, Wakeford, & Simson.*
Agent for Repondents: *W. A. Loch.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1878 *March* 11, 12.

A. & J. INGLIS . . . . . APPELLANTS;
JOHN BUTTERY & CO. . . . . RESPONDENTS.

Contract, Construction of—Deleted Words—Evidence of Intention by previous Communings.

A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at *Lloyd's*. The specification forming part of the contract contained this stipulation, "*Iron work*:—The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra* (fourteen words deleted, signed *A.* and *J. I.*, *D. G.*). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with *Lloyd's* rules for classification:"—

Held, affirming the decision of the Court below, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at *Lloyd's*; and that neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties.

Ship's Survey Expenses.

Held, reversing the decision of the Court below, that the costs of *Lloyd's* survey, and the Board of Trade tonnage measurement, should be borne by the shipowner.

IN March, 1875, Messrs. *Buttery & Co.* of *London*, acting for constituents in *Penang*, entered into a contract with Messrs. *Inglis*, engineers and shipbuilders in *Glasgow*, by which Messrs. *Inglis* agreed to lengthen, furnish with new machinery, and repair

the iron screw ship, *United Service*, for a total sum of £17,250. The contract was embodied in a stamped memorandum of agreement, with relative specifications attached, and was signed on the 24th and 27th of March, 1875.

The memorandum of agreement was substantially as follows:

(2.) The said *A.* and *J. Inglis* agree to take out the present engines and boilers, cut and lengthen the vessel 40 feet amidships of the same scantlings of materials as at present, with the additional strengthening required by *Lloyd's*, to enable the vessel to be classed 100 A 1, also to fit new spar-deck of teak between poop and forecastle with iron sides, beams, &c. . . . To supply and fit on board a new pair of direct-acting compound engines of 140 H.P. nominal. . . . all to Board of Trade requirements, including new engine and boiler-seats, coal-bunkers, beams, &c. Two steam-winches and separate boiler all complete, and as more fully detailed in the annexed specifications, for the sum of seventeen thousand two hundred and fifty pounds (£17,250 sterling), besides the old materials. Payable by four cash instalments, as follows:—First instalment of £4500 when lengthened portion is framed, say in two months from this date. Second of £4500 when the vessel is plated. Third of £4500 when the vessel is launched. Fourth or balance, when the vessel is completed and ready for delivery.

The specifications contained amongst others the following clauses:

Lengthening.—The hull of the vessel to be lengthened forty feet midships, or as nearly thereto as possible. The scantling, frames, reverse frames, stringers, floors, keelsons, stanchions, beams, decks, ceiling, and all iron and woodwork of this portion of the vessel to be entirely new and complete, of the best material and workmanship, in accordance with *Lloyd's* rules to class the vessel A 100.

Iron work.—The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra* (fourteen words deleted, signed *A.* and *J. I.*, *D. G.*) Deck-beams, ties, diagonal ties, main and spar-deck stringers, and all iron work, to be in accordance with *Lloyd's* rules for classification.

In accordance with this contract the vessel was handed over to Messrs. *Inglis* for repair, but on the 29th of June they wrote to Messrs. *Buttery* that it was found the hull required renewal to a considerable extent, *Lloyd's* surveyor recommending that in order to obtain the desired class, "the whole of the plating between the bulk-heads of the machinery space be removed and replaced with new plates," and that they (Messrs. *Inglis*), did not consider this further expense of about 240 new plates to be included in the contract price of £17,250. Messrs. *Buttery* replied that classification of the vessel was a necessity, and the contract clearly shewed,

H. L. (Sc.) 1878 INGLIS v. BUTTERY.

under the heading "*Iron work*," that Messrs. *Inglis* were to provide any plating required to effect this object. Subsequently after various correspondence, on the 30th of July, 1875, it was agreed that the repair of the vessel should be proceeded with, leaving it to be decided afterwards who was liable for the extra expense of the new plates. A minute of this agreement was indorsed on the original memorandum of agreement. The vessel having been completed, the contract price was paid to Messrs. *Inglis*, but in order not to detain the ship, the charge for the new plates, £1200, and a sum of £60 0*s.* 10*d.* due for *Lloyd's* survey (£53 16*s.* 6*d.*), Board of Trade tonnage measurement (£5), and crew space fee and expenses (£1 4*s.* 6*d.*), were lodged by Messrs. *Buttery* in the *Union Bank of Scotland*.

On a question of multiplepoinding being raised by the bank, as to who was entitled to the fund *in medio* of £1260 0*s.* 10*d.*, Messrs. *Inglis* condescended, *inter alia*:

(Cond. 3.) The third clause of the relative "specification of lengthening, alterations, and repairs," headed "Iron work," bears, "the plating of the hull to be carefully overhauled and repaired." It is admitted that in point of fact, these words were originally followed by the words "but if any new plating is required the same to be paid for extra;" but as it was not contemplated that any renewal of plating would be required, the last-mentioned words were, at Messrs. *Buttery's* request, deleted from the specification.

(Cond. 7.) It was not within the contemplation of either of the parties at the time the contract was entered into that a renewal of the said plating was necessary. At all events, it was not within the contemplation of the claimants, and they did not take the same into account in estimating the contract price.

Messrs. *Buttery* stated in their condescendence, *inter alia*:

(Cond. 5.) In framing the said specification, the Defenders, Messrs. *Inglis*, under the head "*Iron work*," proposed that the agreement between them and the claimants should run thus:

"The plating of the hull to be carefully overhauled and repaired, but if any new plating is required the same to be paid for extra." The claimants objected to the said proposal, in so far as it contained the stipulation embraced in the last fourteen words of the clause quoted. Upon the 25th of March, 1875, they wrote to Messrs. *Inglis*, *inter alia*, in these terms: "We have all throughout understood, and your memo. of agreement before us clearly stipulates, that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer 100 A 1 at *Lloyd's*." Messrs. *Inglis* agreed to this, and said stipulation was accordingly deleted from the contract, and the deletion stands attested by the said Messrs. *Inglis* and the claimants. The agreement of parties was, that all work necessary to obtain the vessel classed 100 A 1 at

Lloyd's, was to be done by Messrs. *Inglis* for the price of £17,250 sterling; and the work for which Messrs. *Inglis* claim the fund *in medio* was required in order that she should obtain the said class.

On the 21st of December, 1876, the Lord Ordinary (1) ranked and preferred the Messrs. *Inglis* to the whole fund *in medio*. Messrs. *Buttery & Co.* reclaimed to the Second Division, and the Court, after hearing the parties, allowed a proof before answer, and subsequently, on the 3rd of November, 1877, their Lordships (Lord *Gifford* dissenting), allowed the claim of Messrs. *Buttery* to the whole sum of £1260 0*s.* 10*d.*, recalling the interlocutor of the Lord Ordinary (2).

On appeal to the House,

The Lord Advocate (3), and Mr. *Benjamin*, Q.C., contended for the Appellants that, on a sound construction of the contract as signed, the renewal of the old worn-out plating of the hull was not included in the contract. The view of the majority of the Court of Session, that the previous communings and the deleted words could be looked at, was erroneous. The Court could not look at the original draft contract to see what alterations had been made, and the contract itself was no better than a draft until signed. *McDonald* v. *Longbottom* (4), mentioned by Lord *Ormidale*, was quite distinct. There the whole subject-matter of the sale was in doubt. *Robertson* v. *Duff* (5) did not bear on this case. In *Magistrates of Dundee* v. *Morris* (6), there was no evidence whether deletion was intentional or not; here the deletion had been initialed by both parties. The deleted words could not be looked at; and the letter of the 25th of March was in no stronger position than the previous negotiations: see *Dickson* on Evidence, ss. 151, 177; also *Greenleaf* on Evidence, p. 387. The words "overhaul and repair" did not include the extensive renewal required by *Lloyd's* surveyor.

[LORD O'HAGAN:—You admit that if there were one or two

(1) Lord *Adam*.
(2) Scotch Cases, 4th Series, vol. v. p. 58; *Scottish Reporter*, vol. xv. p. 37.
(3) Right Hon. *William Watson*, Q.C.
(4) 1 El. & El. 977; 29 L. J. (Q.B.) 256.
(5) 2 Dunlop, 279 (1840).
(6) 3 Macq. pp. 134, 153.]

H. L. (Sc.) 1878

INGLIS v. BUTTERY.

plates to be renewed, you would replace them without extra charge. Where would be the limit?]

It was not a question of one or two plates, but replating one-third of the hull. No contract to deliver up the ship fit and able to be classed 100 A 1 had been made. It would have been madness on the part of the Appellants to make such a contract for £17,250.

The clause headed "*Ironwork*" was divided into two distinct stipulations. Classification only referred to the latter part. The words "all ironwork to be in accordance with *Lloyd's* rules," meant that there should be after the vessel was lengthened additional *internal* strengthening, which was required by *Lloyd's*, and which strengthening varied with the class obtained for different ships. The plates were not wanted to make the vessel seaworthy. The clause in the contract was deleted because the Appellants were lead to believe by the innocent misrepresentation of the Respondents by their agent, the captain of the vessel, that no such replating was necessary, therefore the Appellants entered into the contract under essential error; and should not be in any worse position now than when the necessity of renewal was discovered, when they would have been entitled to have the contract set aside for error. The £60 0*s.* 10*d.* was paid for the Respondents' behoof, and certainly should be paid by them (1).

Mr. *E. E. Kay*, Q.C., and Mr. *Herschell*, Q.C., maintained, for the Respondents, that no dubiety could exist as to the contract. It was desired to have the vessel classed 100 A 1, and the Appellants undertook to do everything necessary to effect that object. The letter of the 25th of March and its answer could be read: *Robinson* v. *Duff* (2). They were a part of the contract, not previous "communings." The Appellants wished to have a clause in the agreement stipulating for the payment of extra plates, and it was to correct that error in the contract that the letter was written. The deleted words should be considered, for they shewed what

(1) See also Bell's Prin. p. 534; *Rogers* v. *Hadley*, 32 L. J. (Ex.) 241; *Adamson* v. *Glasgow Waterworks* (1859), 21 Dunlop, 1012; *Wilson* v. *Caledonian Railway*, 22 Dunlop, 1480 (1860); *McLaurin* v. *Stafford*, 3 Rettie, 265 (1875). The arguments of counsel are very fully referred to by the Law Peers in their opinions.

(2) 2 Dunlop, 279, 294.

Messrs. *Buttery* would not agree to; see opinion of Lord *Cranworth* in *Magistrates of Dundee* v. *Morris* (1); *Chapman* v. *Macbean* (2). The Appellants must have made an estimate for classification, for all offers without classification were lower than that accepted. The wording of the contract alone bound Messrs. *Inglis* to renew this plating for the lump sum of £17,250. "All iron work to be in accordance with *Lloyds'* rules," and the new plating was required by those rules; could it be denied by the Appellants that that new plating was not iron work there alluded to. The Appellants admit that they agreed to strengthen the new portions of the ship for classification, but *Lloyds'* did not class parts of a ship. It would have been an extraordinary contract for Messrs. *Buttery* to have entered into; that the Appellants were to repair one portion of the vessel fit for classification, and another part they were to patch, which patching some other shipbuilder was to take off, so as to have the *whole* vessel classed by *Lloyd's*. The word "repair" meant renewing where that was necessary. If there was an agreement with a slater to "carefully overhaul and repair" a roof, he would not be entitled to charge for every broken slate he renewed. The clause under "*Iron work*" was all one stipulation, and classification referred to the whole. When Mr. *Purdie, Lloyd's* surveyor, found out the state of the vessel surely the Appellants could also have done so. If there was an essential error in the contract the consequence must fall on the Appellants, who took the risk. The amount charged for *Lloyd's* survey depended on the shipbuilder, therefore the Appellants were liable for that expense; no difference was made in the Court below between the two sums of £1200 and £60 0*s.* 10*d.*

The Lord Advocate, in reply.

The following opinions were delivered by the Law Peers:—

LORD HATHERLEY:—

My Lords, we have had the advantage of a very full and able argument on both sides of the question which has been at issue between the Appellants and the Respondents in this case, and we are the more indebted to that argument because, in looking to the

(1) 3 Macq. at p. 164. (2) 22 Dunlop, 745 (1860).

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Hatherley.

judgments of the Court below, although I believe your Lordships, in common with myself, have come to the conclusion that the decision of the majority of that Court is on the whole correct, we have not been able during the course of the argument, and I confess I am not able now, altogether to follow the line of reasoning which was adopted by the learned Judges whose conclusion, nevertheless, we think can be supported; because, my Lords, it appears to me that there has been in this case the introduction of a class of testimony which it is desirable, I think, that we should at once characterize as not being admissible for the purposes for which it has been here introduced. There has been a good deal of evidence adduced with the view of expounding the contract, not for the purpose of explaining the meaning of a particular technical phrase used in the contract, which is a purpose for which it is quite legitimate to use external evidence; but where the words of the contract are not themselves in any way technical, but are plain and simple language, at all events, so plain and simple as to require no aid of testimony specially to explain them,—in that case it is not legitimate to introduce parol testimony to say what the meaning of the contract is.

Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with, and wholly abolished. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe.

It appears to me, my Lords, that the whole case before us, the subject-matter of which is a claim to a sum of £1260 arising in the manner I shall presently mention, must be determined by the construction which is to be put upon an agreement for the repairs of a vessel, together with the specification which accompanied that agreement, and which forms a legitimate part of the agreement which has been entered into between the parties.

The case in controversy arises in this matter: A ship has been repaired by the Messrs. *Inglis*, the Appellants, for the Messrs. *Buttery*, the Respondents in the case, and payment has been made

of the contract sum for the repairs—of that sum, at all events, which Messrs. *Buttery* conceived, and we think they rightly conceived, to be the sum owing for the repairs. That having been done, a dispute has arisen as to a sum of £1200 expended for a particular purpose, which I shall have occasion to refer to more particularly hereafter, and a sum of £60 0*s.* 10*d.*, which has been paid into Court together with the £1200, thus forming the sum now pending between the parties and awaiting your Lordships' decision. The parties were sensible enough to feel that it was not desirable that the ship should be detained whilst the litigation was going on with reference to the amount payable for the repairs, and accordingly by a mutual concurrence they agreed that, instead of the dispute being so carried on to the great detriment of all parties, the vessel itself being *in medio*, that which should be *in medio* should be the £1200 for a certain portion of the repairs or the renewals, whichever they ought to be termed—part of the work executed by the Appellants upon the ship, and a sum of about £54 paid to *Lloyd's* surveyor for his report and certificate for the classing of the ship, and a small sum of £5, which was paid by the Appellants, as being supposed to be payable under certain other provisions contained in the contract, to the Board of Trade with reference to a certificate given by that Board of the work having been properly executed, and a small sum for fees to the crew.

My Lords, I think that this sum of £60 0*s.* 10*d.* may be at once disposed of, by saying that we have none of us been able during the argument to see any part of the contract which relates to the payment of fees so as to throw the *onus* upon the Appellants, Messrs. *Inglis*, of satisfying the fees which had to be paid in order to obtain the classification. Whatever may be the result of the construction of the agreement itself, with reference to what was to be done in regard to the repairs according to the demands and requisitions of *Lloyds* for classification, there is nothing in the agreement which states that the fees in respect of obtaining such a survey and classification are to be borne by the Appellants. And I may say the same as to the Board of Trade survey; they appear to be left to be borne by the owners whose vessel had the benefit of the survey and classification. Therefore, my Lords,

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Hatherley.

while I consider the decision of the Court below to be correct as to the construction of the contract itself with reference to the sum of £1200, I say with regard to the £60 0*s.* 10*d.* that that sum appears to have been erroneously paid, and it does not appear to have been relinquished by the Respondents in the present case in the Court below; indeed, even at your Lordships' Bar some sort of argument was offered in respect of that sum, but nothing that I think convinced your Lordships of the propriety of its being deducted from the Messrs. *Inglis*. Therefore, in respect of that sum we cannot concur in that part of the decision of the Court below.

I pass now to the main part of the case, that which relates to the £1200. The contract is in this form: Messrs. *Inglis* agree to take and Messrs. *Buttery*, the Respondents, agree to deliver a screw steamer to Messrs. *Inglis* of *Glasgow*, to be lengthened and supplied with new machinery. That was done. The ship was put in the hands of these builders for the purpose of being cut and lengthened, and supplied with new machinery. Those were the two leading purposes of the agreement. The second clause in point of enumeration, but the first in point of agreement with Messrs. *Inglis* is this: Messrs. *Inglis* "agree to take out the present engines and boilers, cut and lengthen the vessel forty feet amidships of the same scantlings of materials as at present, with the additional strengthening required by *Lloyd's*, to enable the vessel to be classed 100 A 1." That then is the first stipulation or engagement which is entered into, namely, to cut the vessel in two, to lengthen it by forty feet amidships, and when so lengthened, the scantlings, that is to say the sides in proportion to the weight and the materials and the like, are to be as at present, but with such additional strengthening as would be required by *Lloyd's* to enable the vessel to be classed 100 A 1.

Then there is a second stipulation in the agreement, which is "to fit new spar-deck of teak between poop and forecastle with iron sides, beams, &c., shifting foremast and boats davits. To supply anchors, and chains, and patent windlass worked by chain from fore steam winch." So far it amounts to this; first of all the ship is to be cut in two, she is to have forty feet added to her length, and the scantlings are specified, she is to be so strength-

ened as *Lloyd's* agent shall require to take that particular classification. The second engagement is to have a spar-deck, which I believe is, as has been explained to your Lordships, a deck to join the raised part of the poop and the raised part of the forecastle so as to make a flat uniform surface, or what is called an awning deck, the whole length of the vessel. That is to be of teak, and to have "iron sides, beams, &c., shifting foremast, and boats davits;" then "anchors and chains, and a windlass" are to be supplied.

Then we come to a third stipulation, which is a different one from any repairs to be done to the ship: "To supply and fit on board a new pair of direct acting compound engines of 140 horse-power nominal." The description of those engines is fully given. That is to be done according to the Board of Trade requirements, because, as has been explained to your Lordships, the committee of *Lloyd's* watches over the construction of the ship principally with regard to its strength and its seaworthy capacity, but it does not deal with the machinery—the machinery is a subject matter which is dealt with by the Board of Trade. Then it is stated that the price shall be £17,250 and the "First instalment of £4500 is payable," when lengthened portion is framed—"say in two months from this date. Second of £4500 when the vessel is plated." That is not unworthy of notice—the expression is "when the vessel is plated." "Third of £4500 when the vessel is launched." "Fourth, or balance, when the vessel is completed and ready for delivery."

That, my Lords, is the form in which the contract itself, the leading document of the whole engagement, is framed. But there is annexed to this a memorandum or specification, as it has been called during the argument, and the specification is "A specification of lengthening, alterations, and repairs agreed to be executed on the screw steamer." The ship is to be lengthened, it is to be altered, it is to be repaired—the lengthening is to be of forty feet. "The scantling, frames, reverse frames, stringers floors, keelsons, stanchions, beams, decks, ceiling, and all iron and woodwork of this portion of the vessel to be entirely new and complete, of the best material and workmanship, in accordance with *Lloyd's* rules to class the vessel A 100."

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Hatherley.

Now, Mr. *Benjamin* in his argument upon this part of the case called your Lordships' attention to the framing of the leading contract, as I have termed it, and contrasted it with the specification, and endeavoured to lead the House to a consideration of the specification as exhibiting in detail, and following precisely step by step, the engagements contained in the original contract, developing those engagements by taking them up one by one, and applying a portion of the specification to a portion of the engagements in the contract in each case. He argued it thus; He said: You find the first engagement is to cut and lengthen the vessel by forty feet—that being the case, the first item of the specification relates to that portion of the work, and says, "All iron and woodwork of this portion of the vessel to be entirely new and complete, of the best material and workmanship, in accordance with *Lloyd's* rules." You come next to "Iron topsides," that runs thus: "New iron topsides, from main deck to upper deck, including the lengthened part of vessel, to be fitted in room of the present wood arrangement connecting the poop and forecastle, of sufficient strength of scantling for class. Ship's frames to be carried up (continued) to upper deck beams, which are to be of angle and hull iron of sufficient strength to meet classification." He says that refers to the second portion of the main contract, which is, "to fit new spar deck of teak between poop and forecastle with iron sides, beams, &c., shifting foremast and boats davits." And with regard to the words "for class," he says that again is to be done according to what *Lloyd's* classification may require.

Then the next item, which is a very important one, is "Iron work," and here it is that the passage occurs which I have already referred to as being a portion of the specification, which, by common consent, was deleted before the agreement was executed by the Messrs. *Buttery*. I shall read it now as it stands, omitting the words deleted, because I hold that so alone I arrive at the true contract engagement between the parties. It runs thus: "Iron work. The plating of the hull to be carefully overhauled and repaired. Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with *Lloyd's* rules for classification." Now, Mr. *Benjamin* endeavoured to confine the *Lloyd's* rules simply to the "deck beams, ties, diagonal ties,"

and so on connected with the formation of the spar deck, and to exclude the words "to be in accordance with *Lloyd's* rules for classification" from the former part of the sentence which I read under the head of "Iron work," namely, "the plating of the hull to be carefully overhauled and repaired." But I apprehend, my Lords, in the first place, before we consider what the overhauling and repairing means, when we find a specification divided into given heads, marginal notes we may perhaps call them, but whatever term is applied to them certainly definite heads, we must take all that is under one head as being that to which the parties had their attention directed at the time they entered into the agreement, and to which, as far as it is applicable, they assented, that the entire passages placed under the head would be referable. Therefore I read this as if the whole of the iron work was to be in accordance with *Lloyd's* rules for classification. I consider that the whole sentence runs on, and the plating of the hull being of course iron work, that is included in the iron work which is to be in accordance with *Lloyd's* rules for classification. In considering the iron work which is to be done, you cannot restrict that merely to that portion of work which consisted of the forming of the "spar deck of teak between poop and forecastle." There can be no reason why there should be such a restriction of the iron work employed in the repairs which are the result of overhauling, any more than in the case of the work actually connected with the spar deck, if the ship could not be otherwise classed at *Lloyd's* in the class which was required. The whole object of the Messrs. *Buttery* in having these repairs executed was for the purpose of classifying the ship as 100 A 1, and that purpose would otherwise be entirely frustrated.

But Mr. *Benjamin* put it thus—he argued that the whole engagement on the part of Mr. *Inglis* was to be read as if he had said,—I will do for the sum specified in the agreement certain specified works; as far as those works are specified I will undertake to do them according to *Lloyd's* rules, but my contract is so controlled by the leading original contract, that you cannot enlarge my contract into making for you an entirely new ship all framed according to *Lloyd's* rules, irrespective of the consideration that what I have engaged to do is to give forty feet of additional

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Hatherley.

length only, to fit a new spar deck only and those adjuncts which are connected with it, and to overhaul the plating of the hull and to repair that: therefore, if you do not find following that a specific engagement that that shall be done according to the rules and requirements of *Lloyd's*, then you must give to these words "to be in accordance with *Lloyd's* rules for classification," under this head of "Iron work," the effect of confining them to the specific purpose of the spar deck, they not having been applied in the specification to the other larger work or other work, whether larger or not, of the plating of the hull.

First of all, I think we must carefully ascertain what "the plating of the hull to be carefully overhauled and repaired" means, as it is from the expense attending this that the contest has mainly arisen. It is argued that the engagement to overhaul and repair the plating of the hull did not involve any engagement to find new material in the shape of iron plates, so as to replace the actual plating of the hull, but that with regard to places where the hull was found to be defective and out of repair, in consequence either of the wear and tear of the voyage, or in consequence of the bilge water rushing in within, or from any other circumstance by which the plates of iron are apt to be affected, it is said, My engagement was to overhaul the hull and examine any place where such a thing as that might have occurred, but it was no part of my engagement to replace any part of the plating of the hull, more especially if it was to be replaced for the purpose of satisfying the rules and regulations of *Lloyd's*.

Now, my Lords, in the first place, if that had been shewn, which has not been shewn in the present case, namely, that when the vessel came to be examined and repaired, any of the plating had to be removed, not because it was worn, not because the bilge water or the wear and tear of the sea, or any other accident, had damaged it, but to be replaced by new plating in order that the vessel might be classed 100 A 1 at *Lloyd's*, the case might have possibly assumed a different aspect from the different state of circumstances and facts that would be so brought to your notice. But we have nothing of that kind here. Although it was said by some of the witnesses that the plating of the hull was done in order that the ship might be classed 100 A 1, that is coupled at

the same time with this information, as it appears by the evidence, that in fact the plates were in many instances seriously worn and seriously affected by rust—in short, damaged by the wear and tear that had been inflicted upon them. The question then comes to be reduced simply to this: whether or not "carefully overhauled and repaired" included renewal of such plates.

My Lords, it was said by the Appellants' counsel that throughout this agreement you have a distinction kept up, and carefully kept up, between the word "repair" and the word "renew." My Lords, when the agreement came to be sifted and looked through it appeared that that was not a contention that could usefully be insisted upon. It was found that the words had been used interchangeably on more than one occasion. It is remarkable, indeed, amongst other instances, that it occurs in a letter of the Appellants, but it also occurs in different portions of the agreement itself, that the word "renew" is sometimes used where the word "repair" would be appropriately used, and in some cases the word "repair" is used where the word "renew" is equally expressive of the meaning intended. Some evidence was given by experts as to what they would understand if an order were given to them to "repair," whether they would consider or would not consider that that included "renewing." I do not think we are driven to any such consideration as that, because I take it, reading this agreement, and especially the part where the word occurs, and bearing in mind the subject-matter to which it is to be applied, your Lordships cannot entertain a doubt that being "carefully overhauled and repaired," must include the replacing by totally new plates of plates which could not be patched and mended. An illustration was given by Mr. *Kay* in his argument which appears to me to be a very just one. He said, instead of having the plating of a hull "overhauled and repaired," suppose you were to direct a person to overhaul and repair the slating of your house, or the roof of your house, or the like, you would be extremely surprised to find after that was completed that the water came in abundantly through your roof, and that the man you had employed justified himself because he said, I only undertook to "repair" it. I did not undertake to replace the slates in a corner where five or six slates were missing. That would be a very strange construc-

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Hatherley.

tion of an order to "carefully overhaul and repair" your roof or your slating. I think the words "carefully overhaul and repair," must necessarily include that which is the only possible repair where the plating is so worn and injured that it cannot be patched up, namely, withdrawing the injured plates and substituting for them new plates.

My Lords, that being so, it really seems in effect to carry that which has been the main subject of controversy in this particular case, for most of this expense which is now in question arises from the new plates having to be put into the hull of the vessel where the plating was found to be damaged and injured, in order that the vessel might have the proper certificate from *Lloyd's* surveyor, who, of course, would not certify to a half-restored hull that she was fit to receive her classification. In order for the vessel to receive the desired classification, it would be necessary that the vessel should be overhauled, and should be repaired by substituting completely new plates in cases where the repair could not be effected by means of patching the old ones.

My Lords, it is said, and Mr. *Benjamin* pressed this greatly upon our attention, and with very great power and vigour, that it would be absolute madness on the part of any one to undertake, for the price mentioned in the agreement, to put the whole of this vessel from stem to stern in a complete and solid state of repair with reference to the hull. The price mentioned in the agreement is £17,250. Well, my Lords, the answer to all that is, that before entering into the agreement, Mr. *Inglis*, the Appellant, either did see or might have seen (and for the purpose of a person who has entered into an engagement that is the same thing) the vessel and the state of the hull to a certain extent. He could not have seen the whole of it when it was in the water; the part that was under water, of course, he could not see; and he could not see the whole of it while the machinery was in the vessel. But we have the evidence of Mr. *Purdie*, quite a disinterested witness, the surveyor for *Lloyd's*, whose evidence is important upon this particular head. Mr. *Purdie* says:

I am one of *Lloyd's* surveyors for the Western District of *Scotland*, and am stationed at *Glasgow*, I was there in 1875, when the lengthening and repairing of the *United Service* took place. These repairs and everything were carried on

under the superintendence and supervision of myself and colleagues, because she was to be classed in *Lloyd's* book 100 A 1 awning decked. That class which the *United Service* got is the best class for that type of ship. A considerable amount of plating was required. All the plating that was done on the vessel was necessary to give her the class 100 A 1 at *Lloyd's*. Nothing was done to her more than was necessary to give her that class. The ceiling did not conceal one-third of the 240 plates that were removed.

Here, my Lords, is a point in controversy. Mr. *Inglis* says: "All I heard about any plating being wanted at the time when I signed this contract was that the master had said there were two or three plates which would want to be wholly renewed, and I was under the impression that no more than that would have to be renewed." Mr. *Purdie*, however, tells us what I have just read. I am not using his evidence at all for the purpose of explaining the instrument, but merely as bearing upon the case for Mr. *Inglis*. He says, "I never should have entered into such an engagement as that if I had thought that so many as 240 new plates would be required." He uses that as an argument that it was impossible that he could have read the agreement according to this construction. But Mr. *Purdie* tells us, "The ceiling did not conceal one-third of the 240 plates that were renewed. There was no ceiling in the bunker; and the whole of the side there would be exposed. They could have been seen by an expert even with the ship afloat." Then in his re-examination he says that he will not say there were no coals in the bunkers, but there could not have been many coals, for the vessel had just returned home from a long voyage, and was going to be repaired. I apprehend, therefore, my Lords, that Mr. *Inglis* would have no reason to complain if, having had an opportunity of seeing the state of the hull, he did not exercise it, so as to know to a certain extent the large amount of the renewal of plates that would be required.

I have entered into this part of the case because it has occupied a considerable amount of attention in the Court below. The witnesses have been examined at great length upon what this gentleman did see or did not see, and what he was told and what he was not told, and the amount of hardship he might be subjected to. That was unnecessary, as it appears to me, because, as I said in the first observation I made to your Lordships, I do not consider that this case can rest upon anything outside the contract, or

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Hatherley.

anything except the mere contract itself. We are informed—indeed we had a case the other day before your Lordships' House which bore upon that point—that in *Scotland* an agreement could not, as with us, be reformed and be made conformable if it was previously inconformable to the intention of the two parties (1). There is no such process in *Scotland;* an agreement must either be upheld altogether or set aside altogether; no action will lie for the purpose of having it set straight or reformed, as we call it, between the parties. If an agreement did not carry out the intention of the parties, the only result would be that the party who thought himself aggrieved in this respect could ask the Court to hold that there was no agreement at all.

However, my Lords, in that shape the matter really does not come before us. It only comes before us upon this question; here is this money put on deposit with reference to these contested points, relating mainly to the repairs done to this ship with reference to the hull and with reference to the new plates which had to be inserted, and the question is, who, under the agreement between the two parties, is entitled to draw the sum of £1200, and the sum of £60 0*s.* 10*d.*, afterwards added with reference to the expense of getting the certificate of classification at *Lloyd's?* It all turns, my Lords, on that agreement, and, we having simply to consider the agreement, our duty becomes a very simple one indeed. We have simply to read the agreement, and unless you can adopt the very ingenious view of Mr. *Benjamin,* that you are to restrict the operation of these words in the specification by comparing them with what is contracted to be done in the first contract, it appears to me that the case is completely determined by that special portion of the specification which, referring to "iron work," says, in the first place, "The plating of the hull is to be carefully overhauled and repaired," and then that "all iron-work" is to be done in such a manner that the ship shall obtain the wished-for classification.

There is only one further remark which I think it is necessary to make, in order that there may be no misunderstanding as to the important point how far evidence may be introduced for

(1) *Buchanan* v. *Duke of Hamilton, Weekly Notes,* March 16, 1878; Scotch Cases, 4th Series, vol. iv. pp. 328, 854.

H. L. (Sc.)
1878
INGLIS
v.
BUTTERY.
Lord Hatherley.

the explanation of written instruments. When I turn to the deleted words, and find that in spite of a line being drawn through them I can read the words, which words, being fourteen in number, are these: "but if any new plating is required the same to be paid for extra," it appears to me that, those words having been deleted, and a marginal note affixed shewing that they were deleted before the contract was finally concluded, it is not in the power of any Court to look at words, which have been so dealt with and absolutely taken out of the contract, for any purpose whatever connected with the construction of that contract of which they form no part whatsoever. In this particular case the instrument was not executed before those words were deleted. There might have been an agreement by common consent to delete the words after both sides had executed it; but even then your Lordships could not have looked at them, they having been deleted. You must have looked at the new agreement which the parties had come to. If they had agreed to introduce a new term, or to strike out a term, that would have been a new agreement superinduced, to adopt the expression of one of the learned Judges in the Court below, upon the original agreement. But here there is nothing of that kind; at the time when the words were deleted the agreement was only an offer made by one party, Messrs. *Inglis*, for the acceptance of the other party, Messrs. *Buttery & Co.* Messrs. *Buttery & Co.* did not agree to that offer, and some words were therefore struck out. It is, to my mind, perfectly immaterial whether the instrument was torn up and re-written, written out again with those words no longer contained in it, or whether the course was taken of running through those words as they stood in writing, in order that Messrs. *Buttery* might come to an agreement, which up to that time they had not done. When that was done, they agreed to the agreement which did not contain these words, and that is the only thing your Lordships can construe as being the agreement between the parties.

My Lords, with regard to the authority before Sir *William Grant* (1), I think it only comes to this, that being convinced that an interlineation made in a will had been made at the same time as the codicil, and the codicil being struck through, he was able

(1) *Utterson* v. *Utterson* (1814), 3 V. & B. 122.

H. L. (Sc.) 1878 — INGLIS v. BUTTERY. — Lord Hatherley.

to ascertain, and did rightly ascertain, that, the codicil being cancelled, that amounted to a cancellation of the very thing the testator had done in his will. Therefore it came to an ordinary case of duplicates, where one of the duplicate wills being in the testator's custody and the other being in *India*, he revokes and cancels the one will, and the cancellation of that is a cancellation of the duplicate (1). That is the real explanation of that case, and no other is required.

Therefore, my Lords, what I propose to your Lordships is, that the interlocutor complained of should be affirmed, except so far as it relates to the sum of £60 0*s.* 10*d.*, and that as regards that £60 0*s.* 10*d.* it should be reversed. There may be some doubt as to whether the success of the Appellants in that point should affect the costs, but £60 is a sum worthy of consideration, and it was not given up in the Court below, nor was it given up here until there had been some discussion of the case. Taking this into consideration, perhaps your Lordships will be of opinion that we ought to come to the conclusion that the appeal should be dismissed except as regards the £60 0*s.* 10*d.*, and dismissed without costs of the appeal. We shall not, of course, interfere with the costs below.

LORD O'HAGAN:—

My Lords, I entirely agree with my noble and learned friend who has just addressed your Lordships, and he has stated so fully the reasons on which our judgment will be founded as to relieve me from the necessity of saying more than a few words.

The case appears to me, my Lords, important, not in itself, because, although the sum in dispute is considerable, the principles which should guide us so far as the agreement is concerned are, I think, very clear indeed; but important with reference to the admissibility of evidence. Upon that matter, a question of very great moment arose in the Court below and has arisen before your Lordships, and I am bound to say, with my noble and learned friend now on the woolsack, that, although I concur in the conclusions at which the majority of the Court of Session have arrived, I do not concur in the reasons upon which those

(1) See *Jarman* on Wills, 3rd Ed. vol. i. p. 128.

conclusions were grounded. I speak particularly of the judgment of my noble and learned friend, the Lord Justice Clerk. I do not think that the case is to be decided either with reference to the deleted words, or with reference to the evidence as to communings or writings before or after the completion of the contract.

We were pressed, very much, by Mr. *Benjamin* as to the hardship of the case upon his client. He said that the work had been done and had not been fully paid for. That is simply begging the question. The work undoubtedly was done, but the question is, whether all was not paid which the Respondents had contracted to pay? I am of opinion, after giving the case the best attention in my power, that it was so.

With reference to the deleted words, it is of great importance to have it understood that there is no doubt on that point in the mind of any one of your Lordships. When those words were removed from the paper which had presented the full contract between the parties, they ceased to exist to all intents and purposes; and whether it was possible, as in point of fact it was, still to read them, in consequence of their simply having a line drawn through them, or whether they had been absolutely obliterated, appears to me not to make the smallest difference. The contract was complete after the deletion. The parties had had a confluence of will and purpose, and had come to an identity of decision, and the removal of the words took away from it any sort of qualification or condition which might have been previously introduced into it by them. It appears to me that if we yielded to the extremely able argument which was addressed to us on behalf of the Respondents, we should fall into the error, which has been forcibly denounced on both sides, of attempting to construe a contract, perfect in itself, by acts antecedent to it. The only effect of submitting the deleted words to the consideration of your Lordships would have been to shew what had been in the contemplation of the parties before the contract came to be completed. Such evidence appears to me to be inadmissible, and all the more so for this reason:—If the words were to be allowed to affect the minds of your Lordships in deciding the case, then, had they been obliterated altogether, you must of necessity have permitted that secondary evidence should be given of them. Now, that mani-

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord O'Hagan.

festly could not be done. There is no authority for it, and it is contrary to reason and principle. Therefore the deleted words will be very properly excluded from the grounds of your Lordships' decision.

I need say no more than has been said already as to the impossibility of allowing the class of evidence of what is called "communings," that is to say, negotiations, to be admitted at all, whether those negotiations or "communings" occurred before the contract was completed or afterwards. That contract must stand by itself: and must be construed according to its own words, and the provisions contained within its own four corners.

Proceeding to the question, which appears to me to rest for solution altogether upon the agreement, and the appended specification, I think it is not very difficult to come to a reasonable conclusion as to what was the real understanding between the parties. It was observed, and properly observed, by Mr. *Herschell*, as a very material circumstance in the case, that both the parties knew well what they were about. They knew what the classification of the ship ought to be, and it is perfectly manifest that the proposal, which was made on the one side and accepted on the other, was that she should be classified accordingly. You cannot doubt this, when you observe the nature of the statements in the specification, and the references to the rules of *Lloyd's* in all the cases, I believe, to which those rules are applicable. Those references indicate clearly the intention of the Respondents to have their ship classified—not to have a bit of it classified,—whether this bit or that bit, according to this rule or that rule,—but to have the whole ship classified, and classified in the very highest way.

That being so, my Lords,—and we have the evidence of Mr. *Purdie* (1),—to which my noble and learned friend has referred for another object,—making it manifest that the purpose of the parties was to have her so classified,—then if these repairs—call them repairs, or call them renewals, or call them what you please —were such as were necessary and nothing more than were necessary for that purpose, it is not too strong a thing to say that Mr. *Inglis* should have known, when he entered into the bargain,

(1) See *ante*, p. 566.

that the contract would bind him to complete the repairs in the manner contemplated by those who sought the classification.

With reference to Mr. *Inglis'* ignorance of the condition of the hull, my noble and learned friend has referred already to the evidence of the same Mr. *Purdie;* and nobody can read that evidence, I think, without coming to the conclusion that if Mr. *Inglis* did not know the condition in which the hull was, it was his own fault. Mr. *Purdie* distinctly says upon that part of the case,—"Ship-builders like the Messrs. *Inglis* would certainly be able to see these plates I have just mentioned for themselves." We were told that the Messrs. *Buttery* in their condescendence had declared, what was not to be encountered by such evidence as was given in the case, that the state of the plating was not discoverable. The condescendence does not say that. It simply says that the Defenders and their principals, away in the *Indies* at the time, had not an opportunity of discovering the condition of the vessel, but it does not say that nobody had such an opportunity; and, on the other hand, the surveyor of *Lloyd's* says he had the opportunity and used it, and saw with his eyes what any other eyes might have seen equally well. It seems impossible to have any doubt upon that point of the argument.

Then, in the agreement, putting aside the "communings," and putting aside the deleted words, what have we? We find, first, in the beginning of the particular clause on which the matter appears to me really to turn altogether:—"The plating of the hull to be carefully overhauled and repaired." The first question, of course, is that which has been discussed so much, namely, what is the meaning of the word "repair"? I think it may have either of two meanings, either that of patching, or that of renewing, according to circumstances. It is impossible to say that if, in a case like this, there was really a want of a plate in a particular place, or of half a dozen plates in particular places, the repairing would have been complete, if those plates had not been supplied.

I find in one of the judgments of the Court below something with reference to the meaning of the word "repair" which may be worthy of the attention of your Lordships (1); and certain Scotch authorities, and English authorities also, are material with refer-

(1) Scotch Cases, 4th Series, vol. v., at p. 73.

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord O'Hagan.

ence to the meaning of that word. In *Young's* Nautical Dictionary, it is stated to mean,—"To see that any defect is made good." In *Judd's Johnson's* Dictionary it is stated to mean,—"To restore after injury or dilapidation;" and again,—"To fill up anew by something put in the place of what is lost." Certainly, if these definitions are in any degree correct, there is an end of the question. In *Webster's* Dictionary "to repair" is stated to mean,—"To restore to a sound or good state after decay or partial destruction: as to repair a house, a wall, or a ship; to repair roads and bridges; to rebuild a part decayed or destroyed; to fill up, as to repair a breach; to make amends, as for an injury, by an equivalent."

Nothing can be more to the purpose or more conclusive as to the ordinary meaning of the word "repair." The evidence that was given in this case by experienced persons, with the view of putting a particular conventional meaning upon that word, utterly failed. The witnesses contradicted each other, and some of their testimony appeared to me to be equally contrary to sense and experience. One of them said that if he was employed to repair the deck of a vessel, he would not consider himself bound, or at liberty, to put in a plank for the purpose of "repair." That was not, I think, a reasonable view.

Upon the first part of the clause, which is the determining clause in the case, I am clearly of opinion that Mr. *Inglis* undertook to renew, when he undertook to repair, as far as was reasonably necessary: and the other part of it is equally strong with the first in favour of the Respondents. In reference to the use of the words "iron work," Mr. *Benjamin* contended, and the Lord Advocate also contended, with great force and ingenuity, that the effect of those words should be limited. As I understood them, "all iron work" was not conceived by them to relate to "all iron work" of every kind referred to in all portions of the specification, nor to the plating of the hull mentioned in the beginning of the clause, but was to be confined to the "deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work," being *ejusdem generis* or connected with those particular things. I confess I cannot adopt that view. The words, in the first place, are very large and general, and moreover they occur in a portion

of the clause, the heading of which is "Iron Work." The specification is framed in such a way as to divide under certain heads the particulars which are referred to generally in the agreement, each particular being headed in a special way; and when you find "Iron Work" put at the top of a paragraph, and "The plating of the hull" put next after it, and then "Deck beams, ties," and so forth, and then "All iron work," I do not see that you can ignore the operation of the general title of the clause. Nor do I see how you can apply the requirement that "all iron work" shall be "in accordance with *Lloyd's* rules for classification," merely to the "deck beams, ties, diagonal ties," and so forth, and not apply it to the plating of the hull. The plating of the hull requires the use of iron; and why, contrary to what seems to be the plain meaning of the words, should you confine the operation of the phrase "all iron work" to "deck beams, ties, diagonal ties," and so forth, and not give them application to that plating? If you do give them that application, the matter is clear, and there cannot be difficulty about it.

My Lords, I wish to make only one other observation. Looking at another portion of the specification we find these words—"Ceiling; as much ceiling in holds to be lifted as required by *Lloyd's*, and ship's timbers thoroughly cleaned, examined, and overhauled, cemented, and painted. Any ceiling renewed to be paid for extra." Now, it is very striking that when a renewal, as a separate thing and as an extra, was intended to be provided for, that is specifically stated, whereas, in this case, the iron work of the plates of the hull is not so dealt with, and there is no such provision. Taking the instrument as it stands before us, and not as it stood before the deletion took place, there is no provision of the kind.

On the whole, my Lords, I am clearly of opinion that the judgment of the Court below ought to be affirmed, so far as regards the £1200, but with reference to the sum of £60 0*s.* 10*d.* the judgment must be reversed. For the reasons already given, I concur in thinking that there should be no costs of this appeal.

LORD BLACKBURN:—

My Lords, in this case there is a sum of £1260 0*s.* 10*d.* which has been paid into a bank to abide the decision of some points

H. L. (Sc.) 1878 INGLIS v. BUTTERY. Lord Blackburn.

which were raised. The question which arose in the Court below was whether Messrs. *Inglis* or Messrs. *Buttery* were entitled to that £1260 0*s.* 10*d.* That question arose upon two different matters: as to the £1200, the question was as to whether the work done was extra work or not; as to the sum of £60 0*s.* 10*d.*, the question was whether the moneys paid for certain small matters which made up the £60 0*s.* 10*d.* were moneys which Messrs. *Inglis* ought themselves to have paid, or moneys which ought to have been paid by Messrs. *Buttery*. Somehow or other the question of the £60 0*s.* 10*d.* appears to have been lost sight of altogether in the Court below. I can see no reason whatever why the £60 0*s.* 10*d.* should not be recovered by Messrs. *Inglis*, for I do not see that they were bound to pay that sum at all. Therefore, as regards the £60 0*s.* 10*d.*, the decision of the Court below must be reversed.

My Lords, I also agree that under these circumstances, where the appeal is brought not for a mere nominal sum, but for a substantial sum, there ought to be no costs of the appeal on either side. Both sides succeed to some extent. Messrs. *Inglis* get the £60 0*s.* 10*d.* Messrs. *Buttery* keep the £1200.

Now, my Lords, as to the £1200, upon which I think the decision of the Court of Session was right, although I think it my duty to state distinctly that in my opinion the reasons upon which the Lord Justice Clerk mainly relied were not good reasons for that judgment. He lays down a principle which is not quite accurate. He says that in all mercantile contracts, "whether they be clear and distinct or the reverse, the Court are entitled to be placed in the position in which the parties stood before they signed;" and that he applies, so as to say that you are entitled to look at all that they said and did during the time of the communings, as they are called in *Scotland;* that is to say, whilst the matter was in negotiation, as it is more generally called in *England*, because unless you look at all those things you cannot be in the position in which the parties were, and he takes the document, in which there is a deletion, and looks at the deleted sentence, which in my mind is merely a communing. I cannot think that that is correct.

I think that Lord *Ormidale*, who comes to the same conclusion, comes to it upon right grounds. He says that you are entitled to

look at the surrounding circumstances to a great extent, but not at the communings, and he therefore says, I have been

> Examining the proof and correspondence and taking the benefit of such aid as it affords. I have endeavoured to eliminate and disregard everything except those circumstances which can be fairly and legitimately comprehended by the expression "surrounding circumstances" in its legal sense.

That, I apprehend, is perfectly right and sound.

My Lords, I should hardly mention this, but these principles appeared to me to be of great consequence. Lord *Gifford* expresses in extremely clear words exactly what I think myself when he says:

> Now, I think it is quite fixed—and no more wholesome or salutary rule relative to written contracts can be devised—that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is, that the formal contract shall supersede all loose and preliminary negotiations—that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long, and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness applies to the present case. The deed which we have to interpret as the contract consists of the memorandum and specifications and of nothing else.

Now, my Lords, I agree in every word of that.

Quite consistently with that, I think you may while taking the words of the agreement, look at the "surrounding circumstances," as Lord *Ormidale* expresses it, and see what was the intention. You do not get at the intention as a fact, as Sir *James Wigram* in his Treatise on Extrinsic Evidence calls it, but you see what is the intention expressed in the words, used as they were with regard to the particular circumstances and facts with regard to which they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is per-

H. L. (Sc.) 1878

INGLIS v. BUTTERY.

Lord Blackburn.

fectly legitimate. We have now to look at what this contract means.

I think both Lord *Gifford* and Lord *Adam*, who took a different view of the contract from that which I take, seem to have come to this—that to do repairs cannot mean to do repairs when they are very extensive. That really seems to be the argument they have used. That I cannot agree in.

According to the sound rules of construction what we have to look at is, what when the parties used these words in the memorandum and specification did they mean by them? Upon that I can only say it was an iron ship that was to be lengthened—it plainly appears upon the face of the contract that both parties knew and intended that it should be classed as 100 A 1 at *Lloyd's*, and the one being a shipowner and the other being a shipbuilder, we must take it that both of them were perfectly well aware what the rules of *Lloyd's* were. Both Messrs. *Inglis* and Messrs. *Buttery* must be taken to have been well aware what the ship was, and what the scantlings were, and what was the thickness of the plates of this ship in her normal state and condition if in good order. They both evidently thought—and no doubt they were right, for so *Lloyd's* surveyor seems to think—that if the plates were in good order and condition and in their normal state, and such as they should have been, the ship might have been classed 100 A 1 well enough after she had been lengthened forty feet, and with "the additional strengthening," whatever that may be.

My Lords, when you come to the specification, you find that it says, "The plating of the hull to be carefully overhauled and repaired." Now, I do not say that the words at the end of that sentence, "all iron work to be in accordance with *Lloyd's* rules for classification," apply to the overhauling and repairing of the plates. I am rather inclined to think that they hardly do. And I by no means say that if Mr. *Benjamin* had been correct in his basis of fact, and had established that the only reason why they changed the plates was, that *Lloyd's* rules required that they should be heavier and thicker plates than they had been originally—I am not satisfied that he could not say that substituting

thick plates for thin ones was not repairing—he might have been right in that case. But then I think, as I said before, we must take it upon the evidence that the parties knew, and as a matter of fact were right in knowing—although at the trial there was every means of questioning it, no one seems to have questioned that both sides were right in thinking—that the plates would do for classifying the ship as they wished if they were in their natural and normal condition. The only evidence we really have as to their state is in a letter of Mr. *Inglis*, where he said, "that the reverse bars in holds were much decayed and require renewal in some places; also that the shell plating was greatly wasted, having been originally unprotected by cement." And *Lloyd's* surveyor "recommended" "that the whole of the plating between the bulkheads of the machinery space be removed and replaced by new plating."

When that comes before us unexplained, it certainly seems to me that it amounts to a statement that the plates were so wasted they would not do; and, moreover, I think it goes to this extent, that they were so wasted that you could not merely repair them. "Repaired," I think, means patching where patching is reasonably practicable, and where it is not you must put in a new piece.

Taking that to be the case, Messrs. *Inglis* having said, We will "overhaul" "the plating of the hull" and "repair" it (using the words "overhaul" and "repair"), can it be said, when it was found that many of those plates were so wasted that it was required, in order that the ship should be put in a good condition, that they should be replaced, can it be said that that was not "repairing"? I think it cannot. As I have already observed, some of the Lords of Session seem to me to have thought that a little replacing would be "repairing," but when it turned out to be much, it could not be considered as repairing, on the ground of hardship upon Mr. *Inglis*. Now, I should have thought it would have been hard upon Mr. *Inglis* if he had been unable to discover it beforehand. But the evidence of *Lloyd's* surveyor seems to shew that as to the larger portion Mr. *Inglis* really did commit a mistake in not going down or sending some one down into the hold or the coal bunkers, and that if he had done so he would have

H. L. (Sc.) 1878 — Inglis v. Buttery.

found that a larger number of plates than he expected required renewing. However that may be, we can only construe the agreement as it stands, and it seems to me that he was bound to repair, whether what needed to be done was much or little.

Consequently I am of opinion that as regards the £1200, the judgment of the Court below is correct.

Lord Gordon:—

My Lords, I quite concur in the proposal which has been made to your Lordships. There are one or two points connected with the disposal or management of this case in the Court below that I respectfully think it my duty to bring before your Lordships.

The Lord Ordinary, Lord *Adam*, gave judgment in favour of the Appellants, looking at the documents alone, and not ordering any general proof, and I must say that I think upon the whole that was probably a more judicious course than to open up a proof before answer as it is called. A proof before answer is a very convenient proceeding, but I think it is one which should be very carefully limited before the Court allows it to take place, especially upon such a record as the present, for really there are no averments upon which a proof could well be taken, or which could afford any restriction or limit to the proof. When a proof before answer is granted, it appears to me that the proper course is to limit the proof to certain definite points, which the Court will take up before they leave it to a jury or to a Judge to go into what are called the surrounding circumstances. Going into the surrounding circumstances opens a flood-gate for litigation of a very uncertain character indeed; and therefore I venture to say that the proper course is to define what are the points with reference to which the Court are of opinion that an inquiry is relevant. Unfortunately that course was not adopted in this case.

I quite concur in the view which has been taken by your Lordships, that certain views have been expressed by the Lord Justice Clerk, with reference to the competency of proof, which I think might be attended with dangerous consequences, if it were not that your Lordships have expressed an opinion opposed to the principles which he has laid down. Lord *Gifford*, I venture to

think, has expressed correctly the views which ought to regulate this case.

I concur in the judgment which your Lordships propose.

Interlocutors complained of affirmed, save so far as the interlocutor of the 3rd of November, 1877, *ranks and prefers the Respondents, Messrs. John Buttery & Co., to the sum of* £60 0*s.* 10*d., part of the consigned fund of* £1260 0*s.* 10*d., with interest upon such part since the* 18*th of October,* 1877 ; *and as to such sum of* £60 0*s.* 10*d. and interest, declared that the said interlocutor should be reversed, and that the Appellants should be ranked and preferred as entitled thereto. No costs of the appeal.*

Lords' Journal, 12th March, 1878.

Agent for Appellants: *W. A. Loch.*
Agent for Respondents: *W. Robertson.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1878 March 21.

JAMES GARDNER . . . . . APPELLANT;
EDWARD A. LUCAS AND OTHERS . . . RESPONDENTS.

Lease—Improbative Deed—Statutes 1696, *c.* 15, *and the Conveyancing* (*Scotland*) *Act*, 1874 (37 *&* 38 *Vict. c.* 94), *ss.* 38, 39.

An agreement for a lease was dated the 7th of June, 1873, and consisted of two sheets of paper written bookwise on seven pages. Only the last page was subscribed by the full names of the grantors, the previous six pages being initialed:—

Held, affirming the decision of the Court below, that the agreement was improbative under the Statute 1696, c. 15, which in effect requires that, where a deed consists of more than one page, each page shall be attested in the same manner by the grantor with his usual and accustomed form of signature:

Held, also, that the 38th and 39th sections of the *Conveyancing* (*Scotland*) *Act*, 1874, which dispensed with several requirements essential to the validity of writs in *Scotland* under previous statutes, were not retrospective, and could not remedy the defects in a deed executed before 1874, which was void under the Act 1696, c. 15.

IN this case there were two appeals to the House: the first against an interlocutor of the Court of Session, dated the 13th of June, 1877 (1); and the second an appeal against an interlocutor dated the 8th of February, 1878, holding that a certain writing was not a probative deed (2). The second appeal was heard first, and it being dismissed, the first appeal, as a necessary consequence, was dismissed also.

The subject of the second appeal was an agreement for a lease, dated the 7th of June, 1873, written on seven pages of paper. It was subscribed on the last page with the full names of the grantors and witnesses, but only initialed on the previous six pages. The questions were, whether this agreement was a probative deed under the Statute of 1696, c. 15, or, if that was not the case, whether the 38th and 39th sections of the *Conveyancing* (*Scotland*) *Act*, 1874, would remedy the defect of the absence of the full names of the parties on the first six pages. The leading facts of the case are as follow:—The Respondents, *Edward A. Lucas* and others, are the trustees of the late Sir *George de la Poer*

(1) Scotch Cases, 4th Series, vol. iv., p. 885. (2) *Scottish Reporter*, vol. xv. p. 359.

Beresford, who died in 1873; who was the proprietor of the lands and estate of *Ballachulish*, and valuable slate quarries therein, which he had purchased in 1861. The price of these lands was advanced by a Mr. *Tennant*, solicitor, of *Leeds*, who took the title in his own name. In April, 1868, the Master of the Rolls directed Mr. *Tennant* to convey the estate to Sir *George de la Poer Beresford*, on payment of a sum of £56,000. In 1873 the Respondents, who had been named trustees for this purpose by Sir *George Beresford*, paid off Mr. *Tennant*, but not having succeeded in raising the whole sum, they accepted a loan of £6500 from the Appellant, *James Gardner*, whose son, *George Gardner*, writer in *Glasgow*, the Respondents appointed as agent over the estate. At the settlement of the transaction between Mr. *Tennant* and the trustees in *Edinburgh* in May, 1873, a verbal promise was made by the Respondents to grant the Appellant a lease of the quarries of *Ballachulish* for a term of fifteen years from Whitsunday, 1874, but this lease was to be granted on the same terms and conditions as to rent, lordship, and otherwise, as were expressed in a current lease held by Mr. *Pitcairn*, then about to expire. On the 7th of June, 1873, the parties signed a memorandum for a lease of twenty-one years of the quarries; and whether this writing was a probative instrument or not was the subject of the second appeal.

Subsequently, on the 1st and 14th of November and the 2nd of December, 1873, a deed was signed, which the Respondents believed at the time to be a lease for thirty years, but which was really a lease for thirty-five years.

In March, 1876, the trustees found it necessary to recall the appointment of *George Gardner*, owing to the unsatisfactory state of the accounts of the estate and quarries. They then for the first time found that the lease to the Appellant was widely different in the most important particulars from Mr. *Pitcairn's* lease. They therefore, in October, 1876, raised an action of reduction, removing, and count, reckoning and payment, against the Appellant, *James Gardner*, on the ground that they had been induced to execute the lease of November and December, 1873, by the fraudulent representations made by the Appellant, or by his son *George Gardner*, on his behalf (1).

(1) Scotch Cases, 4th Series, vol. xiv., p. 570.

H. L. (Sc.)
1878
GARDNER
v.
LUCAS.

In March, 1877, a jury found by special verdict

That the trustees were induced to execute the lease of the 1st and 14th of November and the 2nd of December, 1873, by the fraudulent representations made by *George Gardner*, the Appellant's son, and that the Appellant was a consenting party to his making the said fraudulent representations.

The Respondents then moved the Court to apply the verdict. The Appellant resisted this motion, on the ground that the trustees were not entitled to decree of removing, as sought for,

In respect that, in the event of the lease under reduction being set aside, the Defender will be entitled to obtain a lease from the Respondents in terms of the agreement of the 7th of June, 1873, or otherwise in terms of the verbal agreement for a lease of fifteen years.

On the 13th of June, 1877, the First Division of the Court of Session granted a decree of removal (1). On the 17th of July the Appellant received leave from the Court under 48 Geo. 3, c. 151, s. 15, to appeal to the House of Lords against the order for instant removal. This was the first appeal (2).

On the 14th of August, 1877, an action was raised by *James Gardner*, the Defender in the previous case, in order to set up the agreement of the 7th of June, 1873. The conclusions of the summons were to have it found,

That under and in virtue of a minute of agreement dated 7th June, 1873, entered into between the Defenders, Dame *Elizabeth Lucas*, or *Beresford*, *Edward Averil Lucas*, and *Charles Davis Lucas*, and the Pursuer, the said Defenders are bound to grant to the Pursuer a lease of the slate quarries, &c., at *Ballachulish*, *Argyleshire*, for the period of twenty-one years from Whitsuntide, 1874, on the same terms and conditions as to rent, lordship, and otherwise, as are expressed in a lease of the said quarries entered into between *Robert Tennant* and *Alexander Pitcairn*, dated 16 May, 1863:

Or otherwise to have a lease for fifteen years in accordance with a verbal agreement of the trustees.

The Pursuer, *James Gardner*, contended that the Defenders, the Respondents, were bound to grant a lease in terms of their agreement; that in the event of the minute of agreement being held to be not duly executed, or tested, the Pursuer was entitled to have these defects remedied in terms of the *Conveyancing (Scotland) Act*, 1874; and that, in virtue of the actings of the parties, he was entitled to a decree. The Respondents maintained that the document libelled was not obligatory, and they ought to be

(1) Scotch Cases, 4th Series, vol. iv., p. 885. (2) Ibid. 1091.

assoilzied in respect—that although the document consisted of two separate sheets, it was signed on the last page of the second sheet only; that the document was intended to be provisional, and to be followed by the execution of a formal deed, and was in fact followed by the execution of such a lease; that the said document was never followed by possession or otherwise acted on; and that the formal lease having been set aside and reduced, the Pursuer could not have recourse to the document of the 7th of June, 1873. The Respondents also alleged that their signatures to the memorandum of agreement were obtained by fraud.

The Lord Ordinary (1) found that the writing dated the 7th of June, 1873, was not a probative deed, and that there was no relevant allegation that the said writing had been validated *rei interventus*. The Appellant having reclaimed to the First Division, their Lordships, on the 8th of February, 1878, adhered to the Lord Ordinary's interlocutor (2).

On appeal to the House,

Mr. *Benjamin*, Q.C., and Mr. *A. S. Kinnear* (of the Scotch Bar), contended, for the Appellant, that the writing of the 7th of June, 1873, was a valid and obligatory agreement. It was not informal under the Act 1696, c. 15, and even if it were informal, the informality could be remedied in virtue of the *Conveyancing (Scotland) Act*, 1874. The deed also had been validated by homologation and *rei interventus*. It was the signature at the end of a deed which was the operative signature; the marginal signing of previous pages was only intended for identification. Signing by initials was long sanctioned: *Houston*, 1631 (3); *Alexander*, 1755 (4); *Shepherd* v. *Innes*, 1760 (5); see also *Duff's* Feudal Conveyancing, pp. 11, 15. The side signing was a custom, not a solemnity, it existed solely to identify the prior sheets: *Carraway*, 1611 (6); *Grierson*, 1633 (7); *Galloway* v. *Thomson*, 1683 (8); and here the initials of the Respondents were not denied. The

(1) Lord *Rutherfurd Clark*.

(2) The different stages of the case are copiously reported in Scotch Cases, 4th Series, vol. iv., pp. 194, 363, 885, 1091; *Scottish Reporter*, vol. xiv., p. 570; vol. xv. p. 359.

(3) Morr. 16,801.

(4) 5 Brown's Supt. 829.

(5) Morr. 16,818 & 589.

(6) Ibid. 16,802.

(7) Ibid. 16,802.

(8) Ibid. 16,805.

H. L. (Sc.) 1878 GARDNER v. LUCAS.

side-signing before 1696 never amounted to a solemnity, nor was it necessary for all of the parties to sign at the joinings of the sheets: *Ogilvie* v. *Earl of Finlator* (1), and the Statute 1696 enacted that if deeds were written bookwise, then each page was to be signed as the margins were used to be. In *Sym and Scott* v. *Donaldson* (2), a deed, challenged on the ground that it was not side-scribed at the juncture of the sheets, was sustained. See also the *Creditors of William Paton*, 1711 (3); *Fergusons* v. *Burnet*, 1748 (4). These cases shewed that each deed was treated on its own peculiar circumstances. In *McLaren* v. *Menzies*, 1874 (5), a will written bookways and signed on the last page only, was held good. The statutes of 1540, c. 117, and 1672, c. 21, created no standard for the mode of side-scribing. It never was subject to the strict rules of obligatory subscription, it being a custom prior to 1696, and required only for purposes of identification. If there was a defect in this deed, it could be remedied by the 38th and 39th sections of the *Conveyancing* (*Scotland*) *Act*, 1874. That was a remedial statute, and therefore ought to be construed liberally: see opinions in *McLaren* v. *Menzies* (5). Some sections of the Act of 1874 were especially made prospective (52 and 56), and others retrospective (11 and 51), but the 38th and 39th were designed not to sweep in all deeds of a prior date, but such as had not been challenged before the date of the Act, October, 1874. Such an inference could be drawn from the 68th section, see *Veasey* v. *Malcolm's Trustees*, 1875 (6), as to what deeds ought to receive the benefit of the 38th and 39th sections. Very similar language to that in the 39th section was used in 9 Geo. 4, c. 14 (1828), and a retrospective effect was there given: *Towler* v. *Chatterton* (7); *Ballinten* v. *Connor*, 1852 (8). The deed here was not challenged before the Act of 1874 came into force, and therefore that statute could remedy the defect caused by the absence of the full signatures on the previous pages.

(1) Morr. 16,804.
(2) Ibid. 16,713.
(3) Ibid. 16,807.
(4) Elchie's Decisions (with Morison's), voce Writ, No. 22.
(5) Scotch Cases, 4th Series, vol. iii., p. 1151.
(6) 2 Rettie, 748.
(7) 6 Bingh. 258.
(8) 14 D. 927; see also *The Queen* v. *Mill*, 10 Scott's C. B. 379; *Perry* v. *Skinner*, 2 M. & W. 476; *Queen* v. *Leeds & Bradford Ry.* 21 L. J. (N.S.) Magistrates Cases, 193; *Pryor* v. *Pryor*, L. R. 19 Eq. 595; 10 Ch. App. 469; Reid (1863) 1 Macph. 774.

[LORD CAIRNS, L.C. :—The view taken in *McCrummen's Trustees* (1) was that these deeds *never* came into existence.]

The view Parliament intended to be taken of these deeds was that the defect or informality was not fatal until the objection was taken, and the Respondents did not challenge the deed in time. They executed the deed, thinking themselves bound by it, and did not deny their signatures made by initials.

The Lord Advocate (2), and Mr. *J. P. B. Robertson* (of the Scotch Bar), were not called upon to address the House on the part of the Respondents.

At the conclusion of the argument on behalf of the Appellant, the Law Peers delivered the following opinions :—

LORD CAIRNS, L.C. :—

My Lords, the only questions upon these two appeals which have been opened for your Lordships' consideration, and the only questions, as it is admitted at the Bar, which your Lordships have to decide, are questions which at first sight appear to be of very considerable technicality, but are such that the reasoning which your Lordships must apply to them must be in consonance with the practice which has hitherto prevailed in *Scotland* and with the decisions both of the Scotch Courts and of this House when similar cases have been arrived at. The two questions are, first, whether in the instrument before the House, which we should call an agreement for a lease, there has been that compliance with formalities which would make it a probative instrument; and in the second place, whether, if that is not the case, if it was not a probative instrument as the law stood before the year 1874, there is any enactment in the Act which was passed in that year which would remedy the defects in the instrument.

The instrument in question is written, as the term is, bookwise, and extends over a number of pages; it is signed by the persons who were charged with the responsibility of the instrument at the end with the names written at full length, the initials only of the persons so signing being appended in the margin to each of the

(1) 18 Dunlop, 470 (1856).

(2) The Right Hon. *W. Watson*, Q.C. At the conclusion of the case for the Appellant the Lord Advocate mentioned the case of *Urquhart* v. *Urquhart*, 1 Macq. 658.

H. L. (Sc.) 1878 GARDNER v. LUCAS. Lord Cairns, L.C.

preceding pages; and the question is, whether the execution of an instrument in that way is a sufficient compliance with the statute of 1696.

Now, my Lords, the statute of 1696 introduced by way of privilege a mode of execution of deeds and similar documents which had not prevailed and was not sufficient in *Scotland* up to time. The statute proceeds upon the recital that the King,

> Understanding the great trouble and inconveniency the lieges are put to, in finding out of clauses and passages in long contracts, decreets, dispositions, extracts, transumpts, and other securities consisting of many sheets battered together, which must be either folded or rolled up: doth for remedied thereof, with advice and consent of the estates of Parliament, statute and ordain, That it shall be free hereafter, for any person who hath any contract, decreet, disposition, or other security above mentioned to write, to choose whether he will have the same written in sheets battered together as formerly, or to have them written by way of book in leaves of paper, either in folio or quarto.

In other words he may continue if he pleases to resort to the old method of writing the instrument upon a roll, formed by sheets battered together, the name to be written at the point of juncture, or he may adopt this new mode, writing the instrument

> By way of book in leaves of paper, either in folio or quarto; providing that if they be written bookways, every page be marked by the number, first, second, etc., and signed as the margins were before, and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign in writs and securities where witnesses are required by law; and which writs and securities being written book-ways, marked and signed as said is, his Majesty, with consent aforesaid, declares to be as valid and formal as if they were written on several sheets battered together and signed on the margin according to the present custom.

From the cases which were cited at the Bar, it undoubtedly appears that up to the year 1696 the general custom was to sign both at the points of junction and at the end with the full name of the person signing; for the fact that that was the custom is proved by the cases which were cited by way of exception to the general rule. Those were cases which shewed that in particular instances, where, for example, a person was in the habit of signing with initials, or where, not being able to write, he was obliged to sign with a mark, an exception might be made in favour of such persons, and the full signature would be dispensed with. But I asked, and asked in vain, the learned counsel, who have examined every authority upon the point, whether there was any authority which shewed that, either before the statute with reference to the

form of deeds then in use, or since the statute with reference to the new mode that is provided by the statute, this ever had been supported, viz., a deed or a writing executed at the end by a person with his full christian and surname—thereby shewing that he could write and was in the habit of writing his name at length—and at the same time in the margin affixing not his full name, but either a mark or his initials. My Lords, no such case has certainly been cited.

Your Lordships have here the unanimous opinion of the learned Judges in the Courts of *Scotland* (1) that the execution of a deed in that form would not be within the words of the statute which I have read, and your Lordships would in regard to a matter of practice with reference to the form of execution of a written instrument in *Scotland*, be slow to differ from the unanimous opinion of the learned Judges. But I own that, independent of such reluctance to come to a different decision, it appears to me the grounds of that decision are entirely right. I think the words of the statute are not complied with unless that which is the proper signature at the end is also appended by way of signature to the separate leaves. If in the case of any particular person the proper signature at the end be a signature by way of mark or by way of initial, then that may also serve as the proper signature upon each separate page; but if the proper signature at the end be a signature at full length (and the person signing the writing in question here shews that that was his opinion of his signature, and his habit of signature), then the same signature must, as it seems to me, be found on each individual page. So much for the first question which comes before you.

The second and only other question is as to the effect of the Act of 1874. My Lords, upon that I must say that I think there is considerable foundation for the elaborate examination which the learned counsel at the Bar made of the different sections of that Act. No doubt there is, with regard to some of its sections, a very clear statement that they shall apply only to instruments written after the passing of the Act; and with regard to other sections, there is an equally clear statement that those sections shall apply to things done both before and after the passing of the

(1) Scotch Cases, 4th Series, vol. iv., p. 1091.

(2) *Scottish Reporter*, vol. xv. at p. 362.

H. L. (Sc.) 1878 GARDNER v. LUCAS. Lord Cairns, L.C.

Act; and there is a third class of cases, of which the 38th and 39th sections are examples, in which the Act contains no clear and explicit statement of whether it is to be retrospective or merely to be prospective. But in a case of that kind your Lordships have to examine the subject-matter of the enactment of the particular section which you have to construe, to bear in mind the effect of a construction which would make it retrospective, and to ask yourselves whether it is to be supposed that that construction was intended by the Legislature to be given to it. Your Lordships have further to guide and direct you the observations which were made in this House in the case last referred to at the Bar, the case of *Urquhart* v. *Urquhart* (1), that in a matter of this nature any Court will be slow to construe an enactment as retrospective, and thereby as disturbing existing rights, unless Parliament has clearly said that the enactment is to be construed retrospectively.

Now, in order to determine whether the 38th and 39th sections are or are not retrospective, your Lordships must bear in mind that the effect of these sections is directly to bear upon the Act of 1696, and upon everything which has been done under that Act—your Lordships are spared the trouble of any elaborate examination of that Act and its meaning and operation, by the examination which took place of the Act in a case in this House which was decided in the year 1859, the case of *Galbraith* v. *Edinburgh and Glasgow Bank* (2). It was the same as that called *Thomson* v. *McCrummen's Trustees*. The Statute of 1696 there received a very full exposition from the noble and learned Lords who advised the House upon that occasion. Four noble and learned Lords took part in the consideration and examination of the question, and they all arrived with reluctance at the conclusion that the matters which were mentioned as formalities in the Act of 1696 were matters which went to the very existence of the deeds which were authorized by that Act to be framed in a particular way. I observe that the then Lord Chancellor, my noble and learned friend Lord *Chelmsford*, said (3):

> It is absolutely necessary, for the purpose of the creation of the instrument, that you should follow the different requisites which are provided by this statute.

(1) 1 Macq. at p. 736.
(2) (1856) 18 Dunlop, 470; 31 Jur. 425; *M. Bell's* Lectures, Ed. 1867, at pp. 35, 60.
(3) (1859); 21 Dunlop, 3 (24 March, 1859).

And further on he said:

It is impossible for your Lordships to consider the importance of this particular ceremony, or formality, or solemnity, whichever it is to be called, which is now in question.

In that particular case the formality was what was called the pagination, the numbering of each successive page with subsequent numbers.

If the Parliament has distinctly required that before a deed written bookways can have any existence, this, amongst other formalities, should be observed; it is not for us to consider the relative importance of these various requisitions. They are all put precisely upon the same footing, and if you may get rid of the paging of the deed or instrument, you may get rid of the signature of the pages, and you may get rid of that portion of the witnessing clause which requires the number of the pages to be stated. They are all of them put on precisely the same footing, and there is no reason if you are at liberty to get rid of one why you are not equally at liberty to get rid of all. My Lords, I cannot bring myself to any other conclusion than that if a party prefers writing his deed bookways, he must observe all the formalities which the Statute of 1696 requires.

Then Lord *Cranworth* said:

Before the statute, deeds written bookways were not valid according to the law of *Scotland*, and it is only by virtue of the Act of 1696 that they are made valid. And I must own that to that argument great force is to be attributed from the circumstance that in all these cases the Court has beaten about, as it were, to find arguments to sustain the different deeds that have been put forward before them, and none of them have seemed to put forward the observation that though the deed was not valid under the statute it was still valid at Common Law, if written bookways on only one sheet. . . . Therefore," he says, "it has certainly appeared to me that it would be a correct general statement of the Common Law of *Scotland* to say that a deed written bookways might be valid if written upon one sheet, but if it were written upon two sheets it was invalid. That is a necessary consequence from the authorities. I think that must be taken to have been the opinion of the Judges below. And that being quite so, I quite agree in the conclusion come to by the Court of Session that this deed is not valid, as not having been brought within the provisions of the statute of 1696.

Lord *Wensleydale* said:

It clearly appears to me a privilege given, and it annexes a condition to that privilege, for it uses the word "providing," and it insists on providing certain conditions without which parties cannot have the benefit of the statute. The words are so very clear that I think they cannot admit of the least doubt.

And Lord *Kingsdown*, in concurring, said:

It seems to me that the most reasonable interpretation to be given to the statute is that it either introduced a new practice or established a practice already existing, but which was considered of doubtful authority; and that it established or introduced that practice, subject to this condition, that certain formalities or solemnities should be complied with which would have the effect of producing an

H. L. (Sc.) 1878 GARDNER v. LUCAS. Lord Cairns, L.C.

identification of the several pages of which the document consisted, equivalent to, though not precisely of the same form with, that which had been, though not by statutory enactment, yet by usage introduced and in regular use, when instruments were written in what was called the former manner "battered together."

My Lords, looking at the decision in that case, and the reasoning upon which it was founded, the result appears to me to be this: that in the year 1874, wherever you had instruments of the kind in question which, being written bookwise, had duly complied with the provisions of the Act of 1696, they were of course good; they were probative instruments; but if they had not complied with that statute they were absolutely as if they had never been written. They were not things which were voidable, or things as to which there could be any question; they were absolutely removed out of nature, as it were, just as much as if the paper on which they were written never had been in existence. They did not require, therefore, to be struck out or to be sentenced to condemnation; they were things which, for the purpose of title, or any property or persons they might affect, were as though they never had been written.

That being the state of the case in 1874, I ask, where are the words in the statute of 1874 which are sufficient to give vitality to these things, to bring into existence these things, which had already passed out of existence? I may pass over the 38th section, because it is really not the one which is material. The 39th section is this:

> No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution.

My Lords, these words seem to contemplate the possibility of some deed which after the passing of this Act shall be brought for judgment as a thing upon which judgment would be passed at the passing of the Act; but with regard to every instrument which had failed in the formalities of the Act of 1696, and which had been written before the passing of this Act, the opportunity for judgment had gone. It was absolutely gone. The instrument had never come into existence, and except by a strained interpretation it would not come under the words "shall be deemed." The section seems to speak of a future judgment, upon a future instrument brought for judgment after the passing of the Act.

But I do not stop there; I do not rest on what would appear

to be a somewhat slender verbal criticism, but I take the larger view. If the construction contended for by the Appellant is correct the consequence is that this section, by words which at the outset are ambiguous, must have the effect of bringing again into existence, without limit as to time, every instrument which had failed of validity, which had failed to come into existence, by want of compliance with the formalities of the Act of 1696, and must have the effect of setting up every such instrument notwithstanding the titles and the arrangements of property which might have been made upon an assumption that those instruments were absolutely invalid. For, my Lords, observe there is no qualification. There is nothing here which says that the section is not to take effect where arrangements have been made; on the contrary, the only qualification is that contained in the last section, which says:

"Nothing herein shall affect any action now in dependence, or that shall be instituted before the commencement of this Act."

And the commencement of the Act was two or three months after the date of the royal assent. Therefore, the theory must be that the whole of the subjects of *Scotland* upon whose property the shadow of any instrument which had failed in its formalities had fallen before the Act passed, would be subject to have that instrument springing into validity and operating upon their property or upon their persons unless within the two or three months to which I have referred, they instituted an action of declarator to have the instrument declared invalid. The thing might have passed out of their recollection—it might have been treated years before the Act of 1874 had passed as a document which went *pro non scripta*, and yet they might find that under the ambiguous words of this 39th section the instrument came again into validity. The proposition only requires to be stated in that way to shew that this is a construction which your Lordships would not arrive at unless compelled by the strongest and clearest words of the statute. It is admitted that the words are not clear, that they are ambiguous, and if so it appears to me that these considerations to which I have adverted would at once lead your Lordships to refuse to adopt that construction which would produce the gross injustice and the gross anomalies to which I have referred.

I therefore must say that I entirely concur with the unanimous

H. L. (Sc.) 1878 GARDNER v. LUCAS.

opinion of the learned Judges below, that the sections to which I have referred, the 38th and 39th, are not retrospective. I therefore move your Lordships that the interlocutors appealed against in these two appeals be affirmed, and the appeals dismissed with costs.

LORD HATHERLEY:—

My Lords, although, as has been observed by my noble and learned friend on the woolsack, the question before your Lordships might at first sight appear to be decidedly technical as regards the special point that has been raised in this discussion, yet the principles involved in the decision of this question are of very great importance for the safety of property and estates.

No doubt in every case in which by the law of the land care has been taken to prevent the numerous frauds and forgeries which unhappily occur in the transaction of human affairs, it has been found from time to time that the restriction imposed by the Legislature upon the framing of deeds and the like, in order to secure the integrity of the instrument, may very often be found in practice, as in this particular statute of 1696, to press hardly upon certain individuals who come to be affected by the invalidity of the instrument occasioned by the want of the observance of the due formalities—I am not applying that observation to the present case, but I say such is the case in many instances—yet some such laws have at all times been found necessary, and in this particular case the Legislature has interposed, as it now appears, more than once to correct the special statute which we have before us.

Now this statute of 1696 seems to have been intended for the case of those subjects (as is recited by the Act) who had to send in their documents of title, which were sometimes of considerable length, and who were from the then mode of conveying property subjected to considerable inconvenience in finding the portions of the instrument which they wished to examine, or which more particularly affected them. That seems to have been the moving cause of this statute being passed in order that they might have a more convenient instrument by which property could be affected than was then common in conveyancing. And accordingly the statute having referred to a particular mode, described as that of a roll of portions of paper battered or glued one to another and attested as to the number of sheets in order to give assurance of

H. L. (Sc.)
1878
GARDNER
v.
LUCAS.
Lord Hatherley.

the honesty of the parties, declared that, as it might be more convenient for those who wished to avail themselves of the privilege, equal validity should be given to an instrument framed bookwise provided certain solemnities were observed.

I shall occupy but a very small portion of your Lordships' time in the observations I have to make, because I think that everything which can be said upon the subject has been well and precisely expressed by the Lord President (1) in the Court below. After reading the provision of the Act of 1696, he says that

> It might no doubt have been contended, upon the construction of this statute, that the provisions that the pages should be marked by number, and that each page should be signed as the margins were before, and that the number of pages should be specified in the testing clause, are not absolute conditions of the validity of deeds written bookways. But that is a matter which cannot admit of any doubt after the decision of this Court and of the House of Lords in the case of *Thomson* v. *McCrummen's Trustees* (2).

So, my Lords, appears to me plainly to be the case, as has been shewn by several passages cited by my noble and learned friend on the woolsack. The case of *McCrummen's Trustees*, as it seems to me, proceeded distinctly upon this ground, that whereas there was a certain mode of conveyance anterior to the statute which was found inconvenient, it should be open to all people to have a different mode which would not in itself be valid unless it was enacted by statute; and the statute says we enact, therefore, that this different mode of framing a document shall be valid, and that all who wish to adopt it may do so, provided they follow certain conditions which are here specified; if not, then they have not chosen to avail themselves of the Act. They have executed an instrument which the very existence of the Act shews required an Act of Parliament for its validity, and the Act of Parliament comes in to validate it on certain conditions, which must be strictly observed. The only argument to be heard upon that part of the case was this. There was a citation of numerous authorities by Mr. *Benjamin* to shew that that might be taken to be a compliance with the statute which might not at first sight appear to be so; but it was admitted by the very cases themselves that doubt and difficulty arose from the peculiar mode in which the

(1) Scotch Cases, 4th Series, vol. iv. p. 887.

(2) Feb. 1, 1856; 18 Dunlop, 470; *M. Bell's* Lectures, Ed. 1867, at pp. 35, 60; 21 Dunlop, 3 (24 March, 1859).

H. L. (Sc.) 1878 GARDNER v. LUCAS. Lord Hatherley.

formalities of the statute had been complied with. The difficulty arose because they did not appear to be signed in the very express words of signing, as had hitherto been the custom to be the case. But, my Lords, they were mostly cases of marksmen, whose signature could not be what we ordinarily understand by the word "signature," inasmuch as they knew not how to form the letters which were to compose it; but they were in the habit, not being able to write, to make their mark, by which an instrument could be identified, and that mark was, as I believe it has been in most countries, held to be a signature. A marksman who could not frame the letters which make up a signature, instead of doing so makes a mark by which his instrument may be recognised, and that is held to be his signature. That accounts, I think, for the greater number of the cases which were cited by Mr. *Benjamin*. All of them turned upon special points of that character—not saying you can dispense with one single iota of the provisions which the statute requires to give validity to your deed, but only saying you have complied with it in the best way you can, regard being had to your infirmity and to your not being capable of executing it in this particular manner. There was one case, however, where, although there were one or two sheets bookwise, the only sheet that affected the contract was the last sheet, and that was duly executed and signed according to the statute, the other portions conveying nothing—I suppose they were merely narrative or of that nature, but had nothing to do with the instrument as it was executed. Therefore it was just as if it had been said, "You may take away those sheets, and the instrument remains a good instrument, because, although that part which remains is not glued together as a separate sheet, the whole contract is framed in one sheet; and that being so, what was done with reference to that one sheet has been sufficient, and the instrument is a good and valid instrument."

That being so I am clearly of opinion with my noble and learned friend who preceded me, that with regard to the instrument in question, according to the authority of this House, and the grounds upon which the noble and learned Lords proceeded who advised the House in the case of *Thomson* v. *McCrummen's Trustees* (1), all

(1) Feb. 1, 1856; 18 Dunlop, 470; *M. Bell's* Lectures, Ed. 1867, at pp. 35, 60; 21 Dunlop, p. 3 (24 March, 1859).

the formalities of the statute have not been complied with, and the instrument is without existence; at all events up to 1874 incontestibly it did not exist.

But then it is said that the statute of 1874, which would have the effect of giving validity to instruments afterwards executed in the manner in which this has been, must be construed as also having a retrospective effect, and must affect this instrument such as it is, although it purported to be made in the year 1873, and was not properly framed, and not being properly framed was to my mind not an instrument at all, and had therefore no legal effect or validity whatsoever in 1873; nevertheless, it is said that in 1874 it might be made to have effect.

I would here again refer to the Lord President's judgment, and we may consider also what is the rule that we ought to observe in a matter of such importance in dealing with the construction to be given to an Act of Parliament. He cites first the opinion of Lord *Cranworth* in the case of *Kerr* v. *The Marquis of Ailsa* (1), in which he says:

> Unless there be something in the language, context, or objects of an Act of Parliament shewing a contrary intention, the duty and practice of Courts of Justice is to presume that the Legislature enacts prospectively and not retrospectively.

And in this observation I entirely concur. Then Lord *Cranworth* continues:

> There may, however, be Acts that are evidently on the face of them, by their language and subject-matter, intended to be retrospective,

of which you have instances in the very Act before us, in which certain clauses are declared to be expressly applicable to matters which are past as well as to those which are future.

The dangerous consequences of such a procedure are also well pointed out by the Lord President, who says (2):

> It may be, no doubt, that a deed imperfectly executed before the passing of this statute may not have received any effect, and that nothing may have been done inconsistent with the operation of that deed, and consequently that no existing and vested interest one way or another will arise to be affected by the retrospective action of these clauses. But it is just as likely, on the other hand, that a deed imperfect under the Statute of 1696, or under any of the other statutes, has been abandoned as useless, that is to say, has never been acted upon,—and that

(1) 1 Macq. p. 736.
(2) *Scottish Reporter*, vol. xv. at p. 364.

H. L. (Sc.)
1878
GARDNER
v.
LUCAS.
Lord Hatherle

parties have proceeded upon the footing that it could receive no effect, and, in consequence of that conviction, a landed estate, or a moveable estate as the case may be, has been taken up by the heir-at-law or the next of kin, because the deed which purported to be the testamentary disposition of the deceased could receive no effect; and if these enactments are to receive retrospective effect, of course the result would be that the heir who has taken up the landed estate, or the next of kin in whom the moveable estate has vested by force of law, will be divested in favour of the party in whose interest the improbative instrument has been made.

Now my Lords, you can hardly conceive more serious evils than are there pointed out and designated by the Lord President, and yet without doubt the observations are perfectly just, and the consequences of holding this Act retrospective would inevitably be of the character here described.

From that consideration we will turn to the sections in question. The sections in question have on their face no peculiar phraseology which would induce one to hold them *per se* to be retrospective, or take them out of the general rule which Lord *Cranworth* lays down, that the portions of a statute which are silent in that regard are to be taken *primâ facie* as clearly indicating prospective intention, and prospective intention only, acting from the time the Act comes into operation, which in this statute is precisely fixed by a clause, for it is said to be the 1st of October, the Act being an Act of 1874. This instrument such as it is now—this piece of paper purporting to be an instrument and having never received any valid inception whatever anterior to 1874—being therefore a mere piece of waste paper up to that time—is then, on the 1st of October, 1874, to come into effect with all the consequences which are pointed out by the Lord President. My Lords, I think it would be quite sufficient if there were nothing else in the case merely to state that proposition. But beyond that, there are certain clauses which are intended to have effect before that time, the consequences of which are not of that character which have been designated in the passage I have read from the Lord President's judgment, matters relating to procedure, and not having the same consequential effect upon rights already accrued as any such retrospective effect would give to the clause now in question. In those clauses it is carefully stated that they are to come into effect before the passing of the Act, just as here there is the absence of any such statement whatever.

I think Mr. *Benjamin* pointed out one clause which said that it should not have any effect upon any matter anterior to the passing of the Act. I can only say, in the language of conveyancing, it was *ex majore cautelâ* that that should be put in. I do not think we could found any inference upon that, but that we should rather be led to expect the same phraseology employed in the particular clause in question were such meaning sought to be conveyed. It is enough that you do not find any such retrospective effect given to the clause in question, and that the consequence of your attributing any such effect to it, instead of making the Act effective for the purpose for which it was designed, would be, in fact, creating new rights in parties who had no rights at all, because they could only claim them under a probative instrument; and such a conclusion is not one which your Lordships could come to, especially after the authorities we have had in this House. I may also point out that this is a matter of Scotch conveyancing, and that the case comes before your Lordships' House with strong authority, all the Judges of the Court below concurring.

LORD O'HAGAN:—

My Lords, I quite concur with the noble and learned Lords who have preceded me, and I shall add very little to what has been said. The case is of some difficulty, but upon the first point I have entertained no doubt from the beginning of the argument.

The Court of Session and the Lord Ordinary have been unanimous with reference to the course of practice in *Scotland*, and, certainly, as to such a matter your Lordships will be slow to differ from the learned Judges.

It appears to me that the decision was, at once, unanimous and perfectly correct. The question is, what is the meaning of the section we are considering. Now, I think it lies upon those who contend that the word "sign" is not to be taken in its ordinary conventional sense, to shew by some authority that it ought not to be so taken, especially when we remember that we have not only the word "sign" in the clause, but also a sort of definition of "signature" by the Scotch Legislature. In the Act of 1672, intituled "An Act concerning the Privileges of the Office of the Lyon King at Arms," we have this direction as to the subscription at the end of the instrument;—"They shall subscribe their christian

H. L. (Sc.) 1878 GARDNER v. LUCAS. Lord O'Hagan.

names or the initial letter thereof with their surnames." This seems to shew that, although the initial letter, under certain circumstances, might be employed with the surname, that letter was not itself considered by the Legislature, as it is not considered by people of ordinary sense and understanding, to be a signature in the proper sense of the term.

Then the question arises, if this be so, have the authorities cited by Mr. *Benjamin* led your Lordships to the conclusion that you should not interpret the word "sign" according to its ordinary signification? They do not seem to me really to have touched the case. Some of them were applied to exceptional circumstances, rather establishing the rule against which Mr. *Benjamin* was contending. Some of them regarded persons who could not write, who were marksmen, or who were in such positions as rendered writing impossible; and in those cases the thing was permitted. Then, there were some instances in which it was the custom of individuals to employ initials:—and I may remind your Lordships that the learned Judges in the Court of Session point to that exception, and say it would be perfectly allowable if it were established that it was the custom of the person to use initials only, his friends generally accepting them as his signature. Those authorities manifestly do not touch the matter before your Lordships.

One special case (1) was cited and very much relied upon, but that was a case in which there was a full signature at the end, and that full signature followed upon a paragraph which contained the entire substance of the deed.

Upon the first point, therefore, it appears to me that really there is no ground for controversy.

On the second point, during the argument I had some doubt, I confess, as to the construction of the Act of 1874. As to that, the question is more important for general purposes than the other, and I am glad to say that I have been able to come to the conclusion to which your Lordships have arrived. I do not think that the 38th and 39th sections of that Act ought to be construed retrospectively. In the first place, the opinion which was pronounced by Lord *Cranworth* in the case of *Kerr* v. *The Marquis of Ailsa* (2), followed up as it has been by similar opinions given

(1) *Sym and Scott* v. *Donaldson*, Morr. 16,713.
(2) 1 Macq. 736.

H. L. (Sc.)
1878
GARDNER
v.
LUCAS.
Lord O'Hagan.

by other Judges, is decisive to this effect, that unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective. It appears to me that the ground of those opinions is very plain indeed. There are cases,—English cases, and I believe Scotch cases also,—which take a clear distinction between matters of procedure and matters of right, as to the operation of a statute prospectively or retrospectively. In the case before your Lordships the matter is of a right created by a deed, and unless the execution of that deed fulfil the conditions prescribed by the Legislature no right exists under it. Upon the second point, we must, for the purpose of the argument, assume that the Appellant has failed upon the first; and that up to the year 1874, when the Act in question was passed, there was absolutely no validity in the deed. Can we suppose that in that year, no right existing, as the conditions of a valid execution had not been fulfilled, the Legislature intervened, and by equivocal words, without any expression of clear intention, and in direct opposition apparently to public policy and private interest, established a right that never before had any existence?

I shall not occupy your Lordships' time by saying again what has been already said of the evils resulting from such an interpretation and the unreasonable consequences attaching to it. A man who, on the faith of the construction which, as I think, must now be taken to be correct, had advanced a large sum of money on a purchase would, if the view of the Appellants were adopted, be deprived of all his outlay. An heir or next of kin, who for a number of years had possessed property in the assurance that the law of the land had given it to him and would protect him in it, might find himself all at once deprived of that property by an *ex post facto* decision, and his family are beggared by a construction of which nobody perhaps had ever thought before. Those are consequences of a very serious kind; and although Mr. *Benjamin* said that in a matter of this sort there are no vested interests which your Lordships should regard, I cannot concur with him. The vested interests are those of a man who, acting upon the law as he understands it, and as it really turns out to be, has advanced his money or changed his position:

H. L. (Sc.) 1878 GARDNER v. LUCAS. Lord O'Hagan.

and it cannot be said that in these circumstances such interests do not deserve protection.

With such consequences staring us in the face, we are required to give a retrospective meaning to this Act of Parliament: and this, I repeat, although we have not only no express words capable of such a meaning, but we have in the Act of Parliament itself, in one of its sections, a clear declaration that, save where otherwise expressed, it shall be of future operation; and then we have the Act pointing out in express words the circumstances in which it was intended to be retrospective.

On the whole of these grounds I think it is very clear that upon both the points the appeals should be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. I will not trouble your Lordships with repeating anything as to the effect of the Scotch Act of 1696; except to point out this, which I think is material in considering the Act of 1874. The effect of the Act of 1696 was that a book-deed, if not properly executed, was not binding at all, but was altogether invalid. It was exactly as if it had not been made. If the party had not signed it at the bottom, or not signed each page, or gone through other preliminaries, he was as free from his bargain as if he had never signed anything. It was absolutely invalid. In case of *rei interventus* there might be a sort of conclusion or estoppel from something that might happen hereafter; but in the meantime it was not binding; it was not a contract, but it was invalid and without any effect at all.

Now, taking that view, which I consider to be of great importance in considering the second question, I come to see whether the Act of 1874 has the retrospective effect of turning that instrument, which was invalid before, into a valid instrument now. That I take to be the question which really arises here. This Act of 1874 has a great many clauses in it; some are expressed in terms that leave no doubt at all that the Legislature intended them to be retrospective, some of them are expressed in terms that leave no doubt that the Legislature did not intend them to be retrospective; but this particular one, the 39th section —for I think the 38th may be passed over—the 39th section is expressed in words which by no means, taking the words only,

would shew whether the Legislature did mean it to be retrospective or no. It is that,

> No deed, or instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution.

Now these words by themselves do not certainly indicate to me very clearly upon their face whether those who passed them intended they should be retrospective, or that they should not; so far as the words go, I think it extremely probable that of the lay members of the Legislature who passed the Act many might think they were retrospective; but we must construe the Act according to the legal rules of construction to see whether it expresses an intention of the Legislature that it should be retrospective. Now the general rule, not merely of *England* and *Scotland*, but, I believe, of every civilized nation, is expressed in the maxim, "*Nova constitutio futuris formam imponere debet non præteritis*"—*primâ facie*, any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to shew it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal.

But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *primâ facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to shew that is not the case. The Lord President has put instances which shew the reason and object for this ruling.

H. L. (Sc.) 1878

GARDNER v. LUCAS.

Lord Blackburn.

We must apply the ordinary rule in considering statutes, and say it is not retrospective for such a purpose as this, there being no evidence of intention upon the face of the language to make it retrospective.

I would rather be understood as giving my impression than as pledging myself, because I have not had the opportunity of consulting the authorities—that in regard to evidence, legislation may be retrospective. I mention that, simply because there are other sections in this Act of which I by no means say they are not retrospective. For instance, the 40th section is

> Every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears.

No question arises upon that section here, and I merely put it in by way of protest, and as not to be supposed to express an opinion whether that would or would not apply to holograph wills that were executed before the 1st of October, 1874. So in the 54th section,

> No challenge of any deed, instrument, or writing, recorded in any register of sasines, shall receive effect on the ground that any part of the record of such deed, instrument, or writing is written on erasure, unless such erasure be proved to have been made for the purpose of fraud.

I do not say that it is a matter of evidence only, and that therefore it is retrospective; I only say I am not, in deciding this case, indicating an opinion as to whether that would be retrospective or not, and I have no doubt that in the sixty odd sections that occur in this Act there are several of them to which a similar observation would apply.

My ground for saying that the 39th section is not retrospective is, that if it were retrospective it would have the effect of making that a valid contract which, as the law stood at the time it was executed, was not valid at all.

LORD GORDON concurred.

Interlocutors appealed from confirmed, and appeals dismissed with costs.

Lords' Journals, 21st March, 1878.

Agent for Appellant: *William Robertson.*

Agents for Respondents: *Connell, Hope, & Spens.*

[PRIVY COUNCIL.]

THE MAYOR, ALDERMEN, AND CITIZENS OF MONTREAL . . . . . } DEFENDANTS;

AND

HARRISON STEPHENS . . . . . PLAINTIFF.

J. C.*
1878
Jan. 30, 31;
Feb. 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Commissioners in Expropriation—Apportionment of Indemnity—27 & 28 Vict. c. 60—29 & 30 Vict. c. 56, s. 12.

The Commissioners of Expropriation appointed under Act 27 & 28 Vict. c. 60, must under Act 29 & 30 Vict. c. 56, s. 12, at the same time that they determine the amount of indemnity for expropriated land, assess and apportion that indemnity upon the different persons benefited by the improvements. Such assessment and apportionment cannot be made after the report of the Commissioners has been homologated, and they have become *functi officio.*

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side) (Sept. 16, 1876), confirming a judgment of the Superior Court (Jan. 31, 1873), by which the Appellants were prohibited from enforcing an assessment under which the Respondent had been assessed in a sum of $2855 for certain street improvements, and the said assessment was declared null and void.

The facts of the case sufficiently appear in the judgment of their Lordships.

The action was brought by the Respondent against the Appellants for the purpose of setting aside a certain assessment roll alleged to have been made under the provisions contained in the statutes 27 & 28 Vict. c. 60, and 29 & 30 Vict. c. 56, for the purpose of assessing the amount which the Respondent and certain other persons were alleged to be liable to contribute towards the cost of widening a certain street in *Montreal,* called *Little St. James Street,* and of protecting the property of the Respondent from a

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1878

MAYOR, &C., OF MONTREAL v. STEPHENS.

threatened execution or distress for the amount of such contribution.

The main question in the cause was, whether the assessment roll drawn up under the circumstances stated in the judgment of their Lordships was valid, and entitled the Appellants to levy on the Respondent the amount at which he was therein assessed.

Mr. *Benjamin*, Q.C., and Mr. *Wills*, Q.C., for the Appellants, contended that the proceedings of the Commissioners were regular and the assessment lawful. See 27 & 28 Vict. c. 60, s. 11, sect. 13, sub-sects. 1, 2, 7, 11, 12; sects. 15, 22, 23. Then came 29 & 30 Vict. c. 56, by which enactment power was given for the first time to a majority of the proprietors interested to put a stop to the projected improvement, and the duty of ascertaining by what proportions and in what shares the expenses of the improvement, if proceeded with, should be borne, was taken away from the City Assessors and cast upon the Commissioners appointed by the Judge for the purpose of settling the amount to be paid for the land expropriated: see sects. 11, 12, 13. The two foregoing Acts were in force on the 15th of January, 1868, when the Commissioners began their operations. It was submitted that the words "at the same time" in sect. 12 of 29 & 30 Vict. c. 56, did not point to contemporaneity of procedure, but only to the fact that two inquiries were placed in the hands of the same persons; such a use of the French phrase "*en même temps*," is common, and the probability is that the clause was originally drafted in French and then translated into English. The clause fixing the time was directory only. See *Reg.* v. *Mayor of Norwich* (1); *Reg.* v. *Mayor of Rochester* (2); *French* v. *Edwards* (3).

Moreover the power of a Judge either to fix a term for the duties of the Commissioners, or to accept or to reject their proceedings, applies only to the procedure applicable to the award of compensation, not to that applicable to the assessment on individuals. The power of the Commissioners to assess results from the fact that the statute vests it in them by the mere incident of their appointment for another purpose, and the Judge has no control over its exercise.

(1) 1 B. & A. 310. (2) 7 E. & B. 91.
(3) 13 Wallace, 506 (Sup. Court, U. S.).

It is insisted on the other side, that between the 15th of January and the 15th of April, 1868, 31 Vict. c. 37, was passed and came into operation on the 24th of February, 1868, and that sect. 9 thereof explained and modified sects. 11 and 12 of 29 & 30 Vict. c. 56. This section however, cannot have a retrospective operation so as to invalidate proceedings already regularly begun under the former enactment. Moreover, no notice of opposition under the said section was given until the 14th of April, the day before the presentation of the report.

Finally, the Court had no jurisdiction to set aside the assessment roll in an action *inter partes* for an alleged wrong. The Commissioners themselves should have been made parties. As to an objection to the roll founded on their alleged interest, the proper course to be pursued in that case is pointed out by 27 & 28 Vict. c. 60, s 13: see *Mayor of Montreal* v. *Brown* (1). The annulment of the assessment roll is a very grave matter, and a proceeding to quash it is, owing to its very nature and consequences, not within the competence of an individual to bring on his own behalf alone. The Attorney-General, as representing the Crown, or some person authorized to sue on behalf of the class whose rights are said to be violated, would be the proper Plaintiff in a case of this kind: see Code of Civil Procedure, chap. 10, and sects. 997 and 1033.

Mr. *Bompas*, Q.C., and Mr. *Kenelm Digby*, for the Respondent, contended that the assessment roll prepared by the Commissioners was wholly illegal and void; and was properly so declared *inter partes* in this suit. They referred to the antecedent legislation on the subject; viz., 14 & 15 Vict. c. 128, ss. 66–74, as well as the sections of the existing Act referred to by the other side. It appeared that notarial protests signed by a majority in number and value of the proprietors of the real estate in *Little St. James Street* were submitted to the Commissioners on the 9th and 15th January; but the Commissioners gave them no opportunity to be heard, being guided in all respects by the officers of the corporation.

The Commissioners decided that not only the properties in *Little St. James Street* would be benefited by the said improvement

(1) 2 App. Ca. 168.

J. C. 1878

MAYOR, &c., OF MONTREAL v. STEPHENS.

but a large number of properties in other streets in the neighbourhood, and amongst others the property of the Respondent, situate in *Great St. James Street.* The effect of this determination was, that the parties signing the protest, though a majority of the proprietors of real property in *Little St. James Street,* formed a small minority only of the persons whom the Commissioners so decided to be interested, and consequently that the Respondent was subjected to a tax for the cost of the improvement without having had the opportunity contemplated by the Legislature of opposing it.

It was necessary to the jurisdiction of the Commissioners to give full notice to all parties interested including the Respondent. [SIR BARNES PEACOCK referred to the Civil Procedure Code, sect. 333.] See *Capel* v. *Child* (1) on 57 Geo. 3, c. 99, s. 50. [SIR ROBERT P. COLLIER:—Do you argue that each person was entitled to be heard whether or not the declaration was by a majority?] Yes, for this was in a judicial proceeding. So also upon the question what area of land should be included within the assessment roll: see *Cooper* v. *The Board of Works for the Wandsworth District* (2), and 14 & 15 Vict. c. 128, s. 75 (*Canada*). In a judicial proceeding no man can be deprived of his property without being heard; see *In re Hammersmith Rent-charge* (3); *Painter* v. *Liverpool Oil Gas Light Company* (4); *Reg.* v. *Cheshire Lines Committee* (5); *Beaudry* v. *Mayor of Montreal* (6). The Act of 1866 impliedly required the Commissioners to decide who were the parties benefited, and to publish their decision in time to enable the majority in value of such persons to oppose under sect. 11 of that Act. Further, though the statute, 31 Vict. c. 37, only came into force on the 24th of February, 1868—after the commencement of proceedings in expropriation—the procedure required by that statute was applicable to pending proceedings, and should have been followed. See *Attorney-General* v. *Sillem* (7).

Moreover, the assessment roll must be made "at the same time" as the valuation of the expropriated land; this must at least

(1) 2 Cr. & J. 558.
(2) 32 L. J. (N.S.) (C.P.) 185; 14 C. B. (N.S.) 180.
(3) 4 Ex. 87; 19 L. J. (Ex.) 66.
(4) 3 A. & E. 433.
(5) Law Rep. 8 Q. B. 344.
(6) 11 Moore P. C. 399, 426.
(7) 33 L. J. (Ex.) 209.

mean during the time allowed by the order of appointment for making the valuation; for after they had made their report they became *functi officio* and were possessed of no authority as Commissioners; and the power of making the assessment roll could be exercised only while they held the office of Commissioners in expropriation. Even if the assessment had been made before the homologation of the report, it would not have been a valid assessment.

Mr. *Wills*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal in a suit brought by Mr. *Stephens* against the mayor, aldermen, and citizens of *Montreal*, in which he prayed the Superior Court to declare void an assessment which had been made upon him as his share of the amount to be paid for certain lands which were taken for the purpose of improving the street called *Little St. James Street*, in the city of *Montreal;* he also prayed for damages to be awarded to him by reason of his having had his goods distrained under a warrant of distress for the amount of that assessment.

It is not necessary, having regard to the view which their Lordships have taken, to refer to the earlier proceedings.

It is sufficient to state that on the 3rd of July, 1867, it was resolved by the corporation of the city of *Montreal* to widen *Little St. James Street* on its north-west side from *Place d'Armes Hill* to *St. Gabriel Street*, and that a petition was presented by the corporation to one of the Judges of the Court, in which they represented the fact, and after stating that they had given the necessary notices, prayed that his Honour would choose, nominate, and appoint three competent and disinterested persons to act as Commissioners to fix and determine the price and compensation to be awarded and allowed for each and every of the said lots of ground or real property required by the corporation for the purposes of the said improvement, and that a day might be fixed and appointed upon which the said Commissioners should begin their operations, and

J. C. 1878 MAYOR, &c., OF MONTREAL v. STEPHENS.

also the day upon which they should make their report. Upon that petition an order was made on the 9th of January, 1868, by which three Commissioners were appointed for the purpose of fixing the amount of compensation to be paid for the lands which were required to be taken for the improvements, and it was also enjoined that the said Commissioners should commence their operations on the 15th day of January then current, and should make their report on the 15th day of April then next. That order was made in conformity with the provisions of clause 2 of the 13th section of the 27 & 28 Vict. c. 60, which is in the following words: "The Court or Judge, as the case may be, to whom the said petition shall have been presented shall appoint three Commissioners as aforesaid and fix the day on which the said Commissioners shall begin their operations, and also the day on which they shall make their report; provided always, it shall be lawful for the said Court or the said Judge to extend the said delays upon reasonable grounds being shewn to that effect." By clause 5 of the same section it is enacted "that the Commissioners shall be duly sworn before the prothonotary of the said Superior Court in the form specified in the annexed schedule marked A, and they shall be vested with the same powers and entrusted with the same duties as are conferred by the laws in force in *Lower Canada* upon experts in reference to appraisements, and they shall be entitled to receive a remuneration not exceeding 4 dollars per day each during the whole time they shall of necessity be occupied in the performance of the said duties." By the 333rd section of the Code of Procedure of *Lower Canada* it is enacted, with regard to experts, that they shall "fix the time and place at which they will proceed with the investigation, and notify the parties, allowing a delay of least three days when the distance from the domicile of the parties respectively does not exceed five leagues, and one day more for every additional five leagues." The Commissioners, having the duties of experts imposed upon them by the 5th clause, were bound to fix the time and place at which they would proceed with the investigation, that investigation being to ascertain the amount which was to be paid for the land necessary to be taken for the improvement of the street. The Commissioners then having been appointed, fixed the day. It has not been shewn in the present

case what was the day fixed for commencing their proceedings, but it may be assumed that they were commenced before the 24th of March when the last protest was presented. The Commissioners had first to ascertain and determine the amount to be paid for the land required, and afterwards to make their report on the day fixed by the Judge, the 15th of April.—By the 11th clause of the section, it was enacted that—"So soon as the said Commissioners shall have completed the proceedings relating to the appraisement, and determined the price or compensation for the pieces or parcels of land or real property about to be expropriated, they shall give public notice by means of two placards, one in the French and the other in the English language, to be posted upon or in the immediate vicinity of such pieces or parcels of land or real estate; that on the day mentioned in the said notice all parties interested or claiming indemnity, who may consider themselves aggrieved by the said appraisement, shall be heard before them in one of the rooms of the *City Hall*; and when such parties aggrieved or claiming indemnity shall have been heard as aforesaid, it shall be lawful for the said Commissioners to maintain or modify, at their own discretion, the appraisement made by them of any piece or parcel of land or real estate as aforesaid." Then sect. 12 proceeds: "On the day fixed in and by the judgment appointing the said Commissioners, the corporation of the said city, by their attorney or counsel, shall submit to the said Superior Court, or to one of the Judges thereof respectively, the report containing the appraisement of the said Commissioners for the purpose of being confirmed and homologated to all intents and purposes, and the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal."

If the Act of the 27 & 28 Vict. c. 60, had not been altered or amended, it would have become the duty of the assessors of the city, under sect. 22 of the Act, to assess the amount to be paid for expropriation upon the different persons benefited by the improvements. But by the 12th section of the 29 & 30 Vict. c. 56,

J. C. 1878

MAYOR, &c., OF MONTREAL v. STEPHENS.

sect. 22 of the 27 & 28 Vict. c. 60, was repealed, "and it was enacted that the Commissioners, at the same time that they determine and fix upon the amount of the price, indemnity, or compensation for each and every of the pieces or parcels of ground required by the corporation of the said city for purposes of improvements, shall also proceed to assess and apportion, in such manner as to them may appear most reasonable, the price or compensation, indemnity, or damage, and cost of such expropriation or improvement, in whole or in part, conformably to the resolution of the said council, upon all and every the pieces or parcels of land or real estate which shall have been benefited or may hereafter be benefited by such improvement."

The assessors under the Act of 27 & 28 Vict. c. 60, s. 22, were to commence the assessment as soon as the report of the Commissioners should have been ratified and confirmed; but by the 29 & 30 Vict. c. 56, s. 12, the Commissioners are to assess and apportion the compensation at the same time that they determine upon and fix the amount of it. It was contended in argument that the words "at the same time" were merely directory, but their Lordships are of opinion that the words were used by the Legislature to denote that the fixing of the amount and the apportionment of it should both be completed whilst the powers of the Commissioners as Commissioners exist, that is to say, within the time fixed by the Judge for the making of the report, or that to which the time has been duly extended.

It therefore appears to their Lordships to be clear that the Commissioners could not assess and apportion the amount after their report had been homologated. The Act, however, does not say that the persons who are named as Commissioners shall assess and apportion, but that the Commissioners shall do it, that is, they are to do it *quâ* Commissioners, and not as individuals. After they have made their report, they are *functi officio* as Commissioners.

No act of the Commissioners can be performed by a less number than a majority of them. If after their report has been homologated two of them should die, a Judge could not appoint fresh Commissioners to make the appointment under the 27 & 28 Vict. c. 60, s. 13, sub-s. 10; nor if, after the Commissioners have made

their report they should fail in their duty in making the assessment, could a Judge, under sub-sect. 9 of the last-mentioned section, remove or replace them.

For these reasons their Lordships are of opinion that the decision of the Court of Queen's Bench was correct; being of that opinion, it is unnecessary for their Lordships to decide the other questions which have been raised in this case. One of these questions is whether, according to the true construction of the 31 Vict. c. 37, it did or did not apply to a proceeding which had been commenced before the day on which the Act was passed.

It was urged that unless the assessment be upheld the corporation will have no means of recovering the amount of the valuation which they deposited and paid for the land taken for the improvements. Upon this their Lordships must remark that the deposit was made after the corporation had full notice that the parties objected to their proceedings.

The only remaining question is as to the effect of the action and the judgment which has been pronounced upon it. The prayer of the Plaintiff is, "That the said pretended assessment roll be declared to be illegal, irregular, null and void, and of no effect, and that it be set aside, and the Plaintiff's property be declared free from the said pretended assessment and taxes." It was contended that the Plaintiff had no right to have the assessment set aside altogether. He certainly does pray to have it set aside, but the substance of his prayer is that it be declared null and void as to him, and that it did not warrant a distress being made upon him. The action was a mere personal action, in which he sought to be relieved from the distress upon his property and to have damages for the illegal act of seizure. The judgment does not declare that the assessment is to be set aside, but merely "That this Court is unanimously of opinion that the judgment of the inferior Court which has declared null the assessment made by the Commissioners ought to be affirmed." It cannot have the effect of a judgment *in rem*, and must be construed to mean that the assessment was null and of no effect against the Plaintiff, and that he recover the damages assessed by the Superior Court.

For these reasons their Lordships will humbly advise Her

J. C. 1878 — MAYOR, &c., OF MONTREAL v. STEPHENS.

Majesty to affirm the judgment of the Court of Queen's Bench. The Appellants are ordered to pay the costs of this appeal.

Solicitors for the Appellants: *Ashurst, Morris, Crisp, & Co.*
Solicitors for the Respondent: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

J. C.* 1878 — *Feb.* 6, 7; *March* 12.

JAMES DUNBAR SMITH . . . . . DEFENDANT;

AND

HER MAJESTY THE QUEEN . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland—Crown Lands Alienation Act, 1868, *s.* 55, *s.* 51, *sub-s.* 5—*Residence—Abandonment—Forfeiture—Judicial Inquiry by Commissioners.*

4 App. Cas. 328

Sect. 55 of the *Crown Lands Alienation Act*, 1868, exempts selectors of additional selections from residence upon them; but *quære*, whether a certificate under sect. 51, sub-sect. 7, exempts the holder from further residence after the date of it.

In order to prove either non-residence or an abandonment under sect. 51, sub-sect. 5, an inquiry thereunder in the nature of a judicial inquiry must be made by the Commissioner, conducted according to the requirements of substantial justice.

APPEAL from an order of the Supreme Court of *Queensland* (March 11, 1875) refusing to grant a rule *nisi* to enter a nonsuit, or a verdict for the Appellant, or for a new trial.

The action out of which this appeal arose was brought under the *Crown Remedies Act*, 1874 (38 Vict. No. 13) in the name of Her Majesty, on the fiat of her Attorney-General for the colony, to recover 871 acres of land in the county of *Aubigny*, in the colony. The writ of ejectment, dated the 11th of December, 1874, was directed to one *Simpson*, as tenant in possession, and claimed the land from the date of the writ. The Appellant appeared by leave of a Judge, and defended for the whole of the land, claiming the same under a lease from Her Majesty to him

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

for a term of ten years from the 1st of January, 1871. On the 8th of February, 1875, a verdict was entered for the Crown after the jury had answered in the affirmative the following questions: 1. Was it proved to the satisfaction of the Commissioner that the lessee had abandoned his selection? 2. Was it proved to the satisfaction of the Commissioner that the lessee had failed to reside during a period of six months? 3. Did the Government declare the lease absolutely forfeited and vacated? The Supreme Court refused to set aside this verdict.

Mr. *Benjamin*, Q.C., and Mr. *Ince*, Q.C. (Mr. *Whitaker* with them), for the Appellant, contended that there was no evidence to go to the jury in support of the Respondent's case; that the Appellant, under sect. 55 of the *Crown Lands Alienation Act*, 1874, was not obliged to reside on his selection; that he had obtained from Mr. *McDowall*, the Commissioner of the *Darling Downs* district, a certificate of fulfilment of conditions; that where the condition of residence has been complied or dispensed with, sect. 51, sub-sect. 5, of the Act does not apply, since it contemplates both abandonment and non-residence as breaches of conditions necessary to justify a forfeiture; that no hearing of the Appellant's case had taken place before the Commissioner, *Charles Coxen*, nor was his decision given in open Court, as required by the Act. Moreover, he stated that he did not regard it as a judicial inquiry. They cited *Walker* v. *Frobisher* (1); *Dobson* v. *Groves* (2); *Harvey* v. *Shelton* (3); *Re Brook and Delcomyn* (4), and the case there cited of *Reg.* v. *Archbishop of Canterbury* (5); *Capel* v. *Child* (6); *Re Phillips' Charity* (7); *Re Fremington School* (8); *Lloyd* v. *Ingleby* (9); *Cooper* v. *Wandsworth Board of Works* (10); *Davenport* v. *The Queen* (11).

Mr. *Kekewich*, Q.C., and Mr. *C. Bowen* (*The Solicitor-General* (Sir *Hardinge Giffard*) with them), for the Respondent, contended

(1) 6 Ves. 70.
(2) 6 Q. B. (N.S.) 637.
(3) 7 Beav. 455, 462.
(4) 16 C. B. (N.S.) 403.
(5) 1 E. & E. 545.
(6) 2 Cr. & J. 558.
(7) 9 Jur. 959.
(8) 10 Jur. 512–515.
(9) 15 M. & W. 465.
(10) 14 C. B. (N.S.) 180; 32 L. J. (N.S.) C. P. 185.
(11) 3 App. Cas. 115.

J. C. 1878 SMITH v. THE QUEEN.

that according to the true construction of the *Crown Lands Alienation Act*, 1868, and in the events which had happened, it was competent to the Governor to declare the lease of the land in question forfeited, and that the forfeiture was duly declared. They insisted that sect. 51, sub-sect. 5, applied to the case, but that under the circumstances proof of abandonment only was sufficient. Upon the question of the validity of the inquiry made by the Commissioner, Mr. *Coxen*, they referred to *Scott* v. *The Corporation of Liverpool* (1); *Wadsworth* v. *Smith* (2); *Hopkinson* v. *The Marquis of Exeter* (3); *Cooper* v. *Wandsworth Board of Works* (4).

Mr. *Ince*, Q.C., replied.

1878 *March* 12.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

An action of ejectment was brought by the Crown against the tenant in possession under a statute of the colony of *Queensland*, intituled "*The Crown Remedies Act*, 1874," to recover possession of a plot of land containing 871 acres. The Defendant (the Appellant) appeared by leave of a Judge to defend the action, claiming the land under a lease from Her Majesty for a term of ten years from January, 1871. On behalf of the Crown it was contended that the lease had been forfeited. The jury found a verdict for the Crown.

An application was made to the Supreme Court for a rule *nisi* to set aside the verdict and enter a nonsuit or verdict for the Defendant, or for a new trial, on the ground of the improper admission and rejection of evidence, and misdirection.

This rule was refused by the Supreme Court, and from the order refusing the rule the present appeal is preferred.

It appeared that the Defendant, who was the selector under the *Crown Lands Alienation Act*, 1868, of a lot numbered 188, in the *Darling Downs* district, made an additional selection of land adjoining thereto numbered 198—the plot of land now in

(1) 3 De G. & J. 334, 367.
(2) Law Rep. 6 Q. B. 332.
(3) Law Rep. 5 Eq. 63.
(4) 14 C. B. (N.S.) 180; 32 L. J. (N.S.) C. P. 185.

dispute—by application in the proper form on the 28th of April, 1871, and obtained from the Crown a lease under the provisions of that Act for a term of ten years from the 1st of July, 1871, at the rent mentioned in the 2nd schedule to the Act. On the 12th of August, 1873, he obtained a certificate from the then Commissioner of the district of compliance with the requirements of sect. 51, sub-sects. 6 and 7 (applying to pastoral and agricultural lands respectively), such as to entitle him to a grant in fee simple on payment of the balance of the ten years' rent. This balance has not been paid.

On the 2nd of December, 1874, the then Acting Commissioner (Mr. *Coxen*) made a report to the Secretary for Public Lands in the following terms:

"I have the honour to report that it has been proved to my satisfaction that the lessee of the selection, as per margin (1), has abandoned the same and failed in regard to the performance of the conditions of residence during a period of six months."

And on the 8th of December following the Governor issued a proclamation declaring the lease to be absolutely forfeited and vacated.

This report and proclamation purported to have been made under the *Crown Lands Alienation Act*, s. 51, sub-s. 5.

The question in the cause is whether the proclamation was warranted by the statute.

Sect. 51 provides that after land has been selected, surveyed, and approved by the Minister of Lands, "the Governor" shall issue to the selector a lease of the land subject to the conditions and provisions hereinafter contained.

After provisions relating to the term of the lease (ten years)—the rent, forfeiture for non-payment, and power to defeat that forfeiture, to the erection of boundary marks and other matters—there follows sub-sect. 5, which is in these terms:

"The lessee of any agricultural or pastoral land, his agent or bailiff, shall reside on such selection continuously and *bonâ fide* during the term of his lease, provided that if at any time during the currency of a lease it shall be proved to the satisfaction of

(1) Reg. No. 198. District, *Dalby*. Lessee, *J. D. Smith*.

J. C. 1878 SMITH v. THE QUEEN.

the Commissioner that the lessee has abandoned his selection and failed in regard to the performance of the conditions of residence during a period of six months, it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated."

Sub-sect. 6 is in these terms:

"(6.) If within three years from the date of selection by lease of any pastoral land the lessee shall prove by two credible witnesses, to the satisfaction of the Commissioner, that he has resided in person or by bailiff on the said land for a period of two years, and that a sum at the rate of not less than 10*s.* per acre for first-class pastoral land and 5*s.* per acre for second-class pastoral land has been expended in substantial improvements on the said land, or that he has fenced in the whole of the said land with a good and substantial fence, then the Commissioner shall issue a certificate that the conditions aforesaid have been duly performed, and the said lessee shall be entitled to a deed of grant in fee simple on the payment of the balance of the ten years' rent."

Sub-sect. 7 applies to leases of agricultural land, and is in nearly the same terms. Then follows sub-sect. 8:

"(8.) No lease shall be transferred or assigned until the original selector has obtained a certificate from the Commissioner that he has duly performed the conditions entitling him to a deed of grant in fee simple on the due payment of the ten years' rent. But after the issue of such certificate the lessee may transfer his lease by application to the Minister for Lands, in the form contained in the schedule 'G' to this Act, and the payment of a fee of 10*s.* for the registration of every such transfer."

Sub-sect. 9 contains some further provisions relative to the acquiring a grant not material to the present purpose.

Sect. 55 of the Act is in these terms:

"55. It shall be lawful for any selector of any piece of land or his legal alienee to make additional selection of lands adjoining to his first selection or to each other, but not otherwise, and not exceeding in the aggregate, including such first selection, 640 acres of agricultural land, 2560 acres of first-class pastoral land,

and 7680 acres of second-class pastoral land, and subject to all the conditions applicable to such first selection except residence: Provided that in the measurement of such aggregate the proportion of frontage to depth shall not exceed the proportion required by the provisions of this Act in the case of an original selection: Provided also, that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such additional selection shall have been applied for."

It has been contended on behalf of the Appellant:

1st. That he is under no obligation to reside on his selection: because, having taken it as an additional selection under sect. 55, residence on it has by that section been dispensed with; and further, because, even if that be not so, the certificate he has obtained under sect. 51, dispenses with residence after the date of it.

2nd. That if residence is not required sub-sect. 5 of sect. 51 does not apply, inasmuch as under that section proof both of abandonment, and of failure to reside, must be made to the Commissioner as a condition precedent to the power of the Government to declare a forfeiture.

3rd. That no proper hearing took place before the Commissioner which would enable the Crown to assert that there had been proof to the satisfaction of the Commissioner, such as is required by the statute, of either abandonment or non-residence.

It has been contended on the part of the Crown that the words of sect. 55 enabling a selector to make an additional selection, subject to all the conditions applicable to his first selection, "except residence," must be read with some qualification to this effect: "Provided that he or his transferee shall continue to reside on his first selection," and that the Commissioner has in effect found that the Defendant did not continue to reside on his first selection.

But their Lordships think it would be a departure from all sound rules of construction to import into the clause, which is in itself plain, such a qualification unless it is to be collected by necessary implication from some other expressions in the Act, and none such have been brought to their notice. It is not improbable that

J. C. 1878 SMITH v. THE QUEEN.

the intention of the Legislature may have been that contended for by the Crown, but if so it has not been expressed. If, on the other hand, the intention was to confer upon an original selector the advantage of exemption from residence on his additional selection, perfectly apt language has been used to express it.

Their Lordships hold that sect. 55 exempts selectors of additional selections from residence upon them. It therefore becomes unnecessary to decide whether or not the Appellant is right in contending that the mere obtaining a certificate under sect. 51, sub-sect. 7, exempts the holder from further residence on his selection. They think it, however, well to say that the inclination of their opinion is against the Appellant on this question. The selector entitled to a grant is not bound to pay the balance of rent, or apply for the grant, and may transfer his lease, or hold it till the expiration of ten years: until the grant has been obtained, or the ten years have expired, the "currency of the lease" appears to continue, and sub-sect. 5 to apply.

It has been contended, however, on the part of the Crown, that the words in sub-sect. 5, "has abandoned his selection and failed in regard to the performance of his conditions of residence during a period of six months," are to be read distributively; that the failure to reside must be taken to apply only to cases where residence is necessary; and that where residence is unnecessary it is enough for the purpose of forfeiture to prove abandonment, and that abandonment was in this case proved.

It becomes necessary, with reference to this contention, to examine the evidence in the cause together with other sections of the Statute. The evidence of the Crown, as far as is material to the questions their Lordships have to consider, is that of Mr. *Coxen*, who says that in October, 1874, he made an investigation as to the performance of the conditions of his lease by the Defendant, and that after beginning it he sent the following notice to the Defendant:—

"*Public Lands Office,*

"Sir, "2nd November, 1874.

"I have the honour to acquaint you that evidence has been brought before me to the effect that you have not carried out the conditions of residence, either personally or by your agent or

bailiff on the selection, as per margin (1), and I have to request that you will shew cause at the next Land Court to be held at *Dalby* on the 11th of November, why I shall not report the abandonment of the said selection, in pursuance of sub-sect. 5 of sect. 51 of *Crown Lands Alienation Act of* 1868."

That on the application of the Defendant's solicitor he granted an adjournment to the 26th of November; that he was then sitting in the Land Court (that is his expression), and that the Defendant's solicitor (Mr. *Hart*) appeared; that Mr. *Hart* produced no witnesses, but tendered a statutory declaration by the Defendant that he had resided on the land continuously and *bonâ fide* from the date of his selection; that he had not abandoned it, and had performed all the conditions and provisions of the Act. He proceeds:

"He (Mr. *Hart*) did not produce anything else. He did not say anything about a certificate. I have no remembrance of anything relative to a certificate being mentioned. I intimated to Mr. *Hart* that that declaration was insufficient to satisfy me of non-abandonment. (That was in the Court-room.) I considered all the evidence before me, including the declaration."

And he further says that what he reported was proved to his satisfaction. On cross-examination he says:—

"Mr. *Hart*, I think, may have said, 'I believe, Mr. Commissioner, you are sitting as a Land Court under the Act of 1868, and I object'—he said words of the same character. I said, 'Pardon me, I am not doing so. I have called upon these gentlemen to satisfy me that they have not abandoned the land and performed the conditions of residence,' or words to that effect. I think I said, 'It is a mere act of courtesy, which I think one gentleman should shew to another.' I believe Mr. *Hart* said, 'Do I understand you are not sitting as a Commissioner's Court under the Act of 1868?' I said, 'Certainly not,' or words to that effect. Mr. *Hart* then asked for production of the evidence referred to in the notification to Defendant. I said, 'I did not consider it a judicial inquiry on my part in this case.' I said, 'Evidence, or a portion of it, had been forwarded, and I could not produce it.' I

(1) Reg. No. 198. District, *Dalby*. County, *Aubigny*. Parish, *West Prairie*, Portion, 198. Area.

J. C. 1878 SMITH v. THE QUEEN.

remember telling Mr. *Hart* I did not wish him to be in ignorance of the charge, which was non-residence and abandonment, and I was ready to receive any evidence he might produce to prove the contrary. I also remember saying it should have due consideration by me if he did so before my reporting. Mr. *Hart* said he couldn't meet evidence the nature of which he didn't know. Mr. *Hart*, I believe, said, 'I may remind you that you knew beforehand I should require it.' I have no doubt I said I never intended to produce it—there is nothing in the Statute to require it. It was after this he handed me the statutory declaration. I don't remember—but the impression on my mind is I should have told him if he asked the question 'I was not holding a Land Court.' Very likely I might have said, 'I could hold it in my office, as it was simply a Court of Inquiry.' I made no formal announcement in the Court, but it was fully understood by all parties."

The learned Judge rejected evidence tendered by the Defendant that the actual state of facts did not justify Mr. *Coxen's* report that there had been an abandonment and non-residence, and left to the jury only these questions:—

"1. Was it proved to the satisfaction of the Commissioner that the lessee had abandoned his selection?

"2. Was it proved to the satisfaction of the Commissioner that the lessee failed to reside during a period of six months?

"3. Did the Governor declare the lease absolutely forfeited and vacated?"

All of which were answered by the jury in the affirmative, and a verdict was entered for the Crown.

Sect. 3 of the *Crown Lands Alienation Act* of 1868 provides for the appointment of Commissioners of Crown Lands, who shall have power to exercise the provisions of the Act, and gives the Governor power to declare and define their duties by regulations.

Sect. 4 is in these terms:

"Such Commissioner shall sit at the land office of his district at certain stated times to be determined by the Governor in Council."

Sect. 5 follows:

"All questions shall be decided by the Commissioner, who

shall give his decision in open Court, subject to confirmation by the Governor in Council."

Sects. 6 and 7 prescribe the manner in which applications for land shall be made to and dealt with by the Commissioners.

It has been contended on the part of the Crown that the judicial character given to the decisions of the Commissioner by sect. 5 applies only to such decisions as he is authorized to come to under the sections immediately following, relating to applications for land, and not to such decisions as he may come to under sect. 51, upon which forfeiture of these lands may be declared, his decisions on questions relating to forfeiture being purely ministerial.

The application of sect. 5 is certainly not so limited in terms, nor does it appear to their Lordships to be so limited by reasonable intendment.

If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the provisions of the Act, it is difficult to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance. Their Lordships are of opinion that the inquiry to be made by the Commissioners under sect. 51, sub-sect. 5, is in the nature of a judicial inquiry.

They do not desire to be understood as laying it down that the Commissioner, in conducting such an inquiry, is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the inquiry is conducted according to the requirements of substantial justice.

These requirements are well known to our law, and have been enunciated in many cases bearing some resemblance to, though not identical with, the present.

When a statute enabled a bishop, if it should appear to his satisfaction, either of his own knowledge, or upon proof by affidavit, that (for various causes) the ecclesiastical duties of a benefice were negligently performed, to require the vicar to nominate a stipendiary curate, and the bishop made a requisition to this effect on the vicar founded on his own knowledge, without hearing the vicar, the Court of Common Pleas held the requisition bad. Lord

J. C. 1878 SMITH v. THE QUEEN.

Lyndhurst, in giving judgment, thus expresses himself: "Does not this (the statute) import inquiry, and a judgment as the result of that inquiry? He is to form his judgment: it is to appear to him from affidavits laid before him; but is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and his property? that he is to come to that conclusion without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence?"

Bayley, J., in the course of his judgment, also observes: "Is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate shall have an opportunity of being heard:" *Capel* v. *Child* (1).

The same view of the law was expressed by Lord *Campbell*, who quoted the maxim, "*Qui statuit aliquid, parte inauditâ alterâ, æquum licet statuerit, æquus non fuit*," in *Regina* v. *The Archbishop of Canterbury* (2).

The same doctrine, only varied in expression, has been again and again applied to the conduct of trustees in deciding on the dismissal of schoolmasters: see *Phillips' Charity* (3); *The Fremington School* (4).

This doctrine is, indeed, carried somewhat further in *Cooper* v. *The Board of Works for the Wandsworth District* (5), wherein it was held that although the *Metropolis Local Management Act* empowered the district board to alter and demolish a house, where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation, the board were, nevertheless, unable to execute that power without first giving the person guilty of the omission an opportunity of being heard.

Erle, C.J., in his judgment, extends the principle somewhat beyond proceedings strictly judicial. He observes: "I fully agree

(1) 2 C. & J. 558.
(2) 1 E. & E. 559.
(3) 8 Jur. 959.
(4) 10 Jur. 512.
(5) 14 C. B. (N.S.) 180; 32 L. J. (N.S.) (C.P.) 185.

that the Legislature intended to give the district board very large powers indeed, but the qualification I speak of has been recognised to the full extent. It has been said that the principle that no man will be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding. I do not quite agree to that. The law I think has been applied to many exercises of power, which in common understanding would be not at all more judicial proceedings than would be the act of the district board in ordering the house to be pulled down."

Assuming the contention of the Crown to be correct, that in such a case as this it would be enough that the Commissioner should be satisfied of abandonment alone, residence being put out of the question, their Lordships would be disposed to say that there does not appear to have been a finding of the Commissioner of abandonment apart from non-residence. But they decide the case upon broader grounds. It appears to them that the Defendant has not been heard in the sense in which "a hearing" has been used in the cases which have been quoted in many others, and in the sense required by the elementary principles of natural justice. The Commissioner doubtless acted with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature. He has not stated upon what evidence he formed his opinion, whether written or *vivâ voce*, whether direct or hearsay. He refused to furnish the solicitor of the Defendant with any note or memorandum of that evidence, to give him any information as to who the witnesses against his client were, or even what was the general character of their evidence. The Defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that term.

It is true that he was summoned to answer general charges of non-residence and abandonment, but a summons to answer charges the evidence in support of which is withheld appears to their Lordships illusory.

Their Lordships are for these reasons of opinion that the Crown failed to establish that there was such a hearing in this case as would enable the Crown to assert that it was proved to the satis-

J. C. 1878 SMITH v. THE QUEEN.

faction of the Commissioner within the meaning of the Act, that the Defendant had abandoned his selection, or had failed in regard to the performance of the conditions of residence, and that consequently the governor had no jurisdiction to issue the proclamation of forfeiture. It follows that so much of the rule as prays that the verdict for the Crown be set aside, and a nonsuit or verdict be entered for the Defendant, should have been made absolute. It becomes unnecessary to discuss so much of the rule as relates to a new trial.

Their Lordships will therefore humbly advise Her Majesty that the order appealed against be set aside, and that in lieu thereof it be ordered that the verdict for the Crown be set aside, and that a verdict be entered for the Defendant, and that the Defendant have his costs in the Court below, and of this appeal.

Solicitor for the Appellant: *Frederick Stanley.*
Solicitor for the Respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

CHARLES BROWN FISHER . . . . . PLAINTIFF;

AND

WILLIAM ALCOCK TULLY . . . . . DEFENDANT.

J. C.*
1878
Feb. 15, 16;
March 14.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Crown Lands Alienation Act, 1868—*Grant in Fee refused—False Declaration by Applicant for Lease.*

In a suit by the Appellant praying for a declaration that a valid and binding statutory engagement subsisted between the Government and himself for the grant in fee simple of certain land which had been previously leased to him, and further praying that the Government might be decreed to issue a deed of grant to him; it appeared that the Appellant had complied with the conditions of sect. 51, sub-sects. 6 and 7 of the *Crown Lands Alienation Act*, 1868 (which provide for an acceleration of the right to a grant in fee) but that the declaration that he lived in *Queensland* made on his application for the lease was untrue to his knowledge:—

Held, that the Government was right in withholding the grant. The declaration formed one of the bases on which the contract was founded; and there was no evidence that the Government knew it to be untrue either at the time the lease was granted or when the rents were received.

Quære, whether a selector who has obtained a Commissioner's certificate that he has fulfilled the conditions of sect. 51, sub-sects. 6 and 7, and has made the payments prescribed by sub-sect. 9, can sue as above without offering to prove to the Governor in Council under sect. 57 his compliance with the conditions of his lease.

APPEAL from an order of the Supreme Court of *Queensland* (May 30, 1876), affirming an order of the Chief Justice (March 16, 1876), whereby the Appellant's amended bill of complaint was dismissed with costs.

The facts of the case are sufficiently set forth in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *J. D. Wood* (Mr. *Davenport* with them), for the Appellant, contended that the Appellant at the time he made the declaration complained of did live in *Queensland*

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1878 FISHER v. TULLY.

within the meaning of the *Crown Lands Alienation Act* of 1868; that whether he did so or not, he *bonâ fide* believed that he did; and that there was no fraud as alleged by the Government. There was no allegation by the Respondent that under sect. 128 there was a right to forfeit; there had been no return of the money: see sects. 46, 53, and 54 of the above-mentioned Act. Moreover the Crown, having the means of knowing the facts and circumstances on which it now relies in support of the allegation that the Appellant did not at the time he made the declaration live in *Queensland* within the meaning of the Act, and having nevertheless approved the Appellant's selection, and issued a lease and received the full purchase-money and deed fees for the land, is not entitled to refuse to the Appellant a deed of grant in fee simple. There is nothing in the Act which says that if you make a false declaration your land shall be forfeited; but it says that if you are otherwise incapacitated to become lessee, your land shall be forfeited: see sect. 51, and sub-sections. Sect. 57 is only supplemental to sub-sect. 5 of sect. 51: *Davenport* v. *The Queen* (1). The act required of the Government was a ministerial act, and therefore subject to the supervision of the Court; if the act was judicial it should have been given in open Court.

With regard to fraud, the Court below did not find as a fact that any had been committed, but only that the Appellant did not "live" as stated. If a person by fraud procures a contract, and subsequently is not in a position to put things *in statu quo*, the remedy is damages, not avoidance of the contract: see *Clough* v. *London and North Western Railway Company* (2); *Morrison* v. *Universal Marine Insurance Company* (3); *Sheffield Nickel and Silver Plating Company* v. *Unwin* (4); *Feret* v. *Hill* (5); *Reg.* v. *Saddlers' Company* (6).

The Attorney-General (Sir *J. Holker*) and Mr. *Kekewich*, Q.C., for the Respondent, contended that the Appellant had been guilty of evasion, and acquired his leasehold thereby; and therefore could not ask for the freehold: see sects. 127 and 128 of the Act.

(1) 3 App. Ca. 115.
(2) Law Rep. 7 Ex. 26, 35.
(3) Law Rep. 8 Ex. 197, 205.
(4) 2 Q. B. D. 214, 223.
(5) 15 C. B. 207.
(6) 32 L. J. (N.S.) Q. B. 337.

The scope of that Act is to make different provisions to meet the requirements of three different classes of people, viz., strangers, persons required to reside, and settlers. In regard to the first class, see the auction sections, 83 *et seq.* In regard to the second, see the homestead sections, 71–6; they get the property at a low price. In regard to settlers, see the selection sections, 39–64; they must live in *Queensland.* What a settler is may be a question, he may still retain a domicile elsewhere, but it does not follow that a settler should be a man like the Appellant, who only occasionally visits the country to look after his property and affairs. At the time of making his application the Appellant should have been living in *Queensland.* He was not so living, and attempted to make the authorities believe that he was. He did not prove to the Government that he had faithfully complied with all covenants and conditions contained in or implied by his lease under the provisions of the *Crown Lands Alienation Act,* 1868: see sects. 52, 58, 59, and 60. There was no contract on the part of the Government to grant the reversion; nor was it bound to grant it, even if it knew of a breach of condition, and yet accepted rent. [SIR MONTAGUE SMITH referred to sect. 54.] As to sect. 57, see sects. 46, 51, sub-sects. 5, 9. Sub-sect. 9 is intended to apply to a man who has got his certificate under sub-sects. 6 or 7. In fact, whenever there is an interval between obtaining certificate and the time of applying for a grant, the Government must come in and see if the conditions of the lease have been fulfilled.

With regard to fraud, the Appellant got the lease, which was the first step in the contract, by false representation, and therefore he cannot get the rest of the contract specifically performed. The cases cited on the other side have no application, as here there was no notice or knowledge. The means of knowing that the statement was false is not the same thing as knowing; the Government was not bound to make inquiries, they *primâ facie* rely on the truth of the declaration. As to the effect of means of knowledge, see *Directors, &c., of the Central Railway Company of Venezuela* v. *Kisch* (1). Misrepresentation, though in a slight degree, is an objection to specific performance; see *Cadman* v. *Horner* (2),

(1) Law Rep. 2 H. L. 99.

(2) 18 Ves. 10.

J. C. 1878 FISHER v. TULLY.

Clermont v. *Tasburgh* (1), *Clapham* v. *Shillitto* (2), and *Harris* v. *Kemble* (3).

Mr. *Wood*, in reply, urged that the Government had never taken advantage of sect. 128 and forfeited the lease, and that therefore the lease remained, and was voidable only.

1878 *March* 14.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Supreme Court of the Colony of *Queensland*, dismissing a suit of the Appellant, in which he prayed for a declaration that "a valid and binding statutory engagement" subsisted between the Government of the colony and himself for the grant of certain land to him in fee simple, and further prayed that the Government might be decreed to issue a deed of grant to him.

The main defence set up by the answer of the Defendant, who represented the Government, was that a declaration made by the Appellant upon his original application to become a conditional purchaser of the land, viz., that he lived in *Queensland*, was untrue, and "a fraud upon the Government and people of the colony."

In 1869 the Appellant applied to the Government for some agricultural and pastoral land, then open to selection by conditional purchasers, under the *Crown Lands Alienation Act* of 1868. The land so applied for consisted of 1014 acres, and was numbered 307.

The application was made under sect. 46 of the Act of 1868, which enacts:—"The mode and terms of selection shall be as follows: Any person may on any office day tender to the Commissioner or land agent for the district an application in the form contained in Schedule E."

The form is as follows:—

18 .

"I do hereby state my desire to become the lessee of the Crown lands hereunder described, which is now open to selection

(1) 1 Jac. & W. 119. (2) 7 Beav. 146.
(3) 1 Sim. 111.

without competition under the provisions of the *Alienation of Crown Lands Act*, 1868, and I hereby tender the sum of pounds shillings and pence as the first year's rent together with the survey fee. I declare that I live in *Queensland*, and that I am above the age of twenty-one years, and that I apply for such portion on my own behalf and for my own use, and not as an agent or trustee for any other person whatsoever. And I further declare that I apply for the said portion in order that I may use the same, and that I have not entered into any agreement to sell, demise, or mortgage the said portion.

"Declared before me (Signature.)

"(Signature.)

"*J. P.*"

A declaration in the above form was made by the Appellant before a justice of the peace, and delivered by his agent at the proper office on the 29th of November, 1869, but it is to be noted that the only date on the declaration was that of the year, "1869;" neither the day nor the month was inserted.

The general scheme provided by the Act in the case of conditional purchase is, that a lease is first granted by the Governor to the selector for ten years, at a fixed rent (which may become purchase-money), payable yearly in advance; then upon payment of the whole of the rent, and, speaking generally, upon performance of the requirements and conditions of the lease and of the Act, the lessee is entitled to a grant in fee simple.

Provision is made, as will be presently seen, for the acceleration of the right to the grant in fee simple upon prepayment of the whole rent.

The lease from the Governor to the Appellant bears date on the 14th of October, 1871. It contains a recital that he had made an application for a lease in the mode and terms required by the 46th section of the Act. The term is ten years from the 1st of January, 1870, and the days for the payment of the rent (£65 10*s.*) are mentioned in a schedule, being the 31st of March in each year. The lease is expressed to be made "with, under, and subject to the several rights, powers, privileges, terms, conditions, provisions, exceptions, restrictions, reservations, forfeitures, and provisoes in the 51st section of the Act of 1868, and all other

[J. C. 1878 FISHER v. TULLY.

the rights (repeating the above words) in the said Act, or any regulations thereunder, relating to selections of a like nature contained."

Before adverting further to the facts, it will be convenient to refer to some of the provisions of the Act of 1868.

Sect. 51 is divided into sub-sections.

By sub-sect. 3 the lessee is required, within six months from the date of selection, to erect boundary posts, or a good and substantial fence along the boundary.

Sub-sect. 5 enacts that "the lessee, his agent, or bailiff, shall reside on the selection continuously and *bonâ fide* during the term of his lease."

Sub-sects. 6 and 7, which provide for an acceleration of the right to a grant in fee, are as follows:—

"(6.) If within three years from the date of selection by lease of any pastoral land the lessee shall prove by two credible witnesses to the satisfaction of the Commissioner that he has resided in person or by bailiff on the said land for a period of two years, and that a sum at the rate of not less than 10*s.* per acre for first-class pastoral land, and 5*s.* per acre for second-class pastoral land has been expended on substantial improvements on the said land, or that he has fenced in the whole of the said land with a good and substantial fence, then the Commissioner shall issue a certificate that the conditions aforesaid have been duly performed, and the said lessee shall be entitled to a deed of grant in fee simple on the payment of the balance of the ten years' rent.

"(7.) If within three years from the date of selection of any agricultural land the lessee shall prove by two credible witnesses to the satisfaction of the Commissioner that he or his bailiff has resided on the land for a period of not less than two years, and that he has expended a sum equal to 10*s.* per acre on the land comprised in such lease, or if at any time during the currency of any such lease the lessee shall prove by two credible witnesses to the satisfaction of the said Commissioner that he has cultivated one-tenth part of the land, or if within three years from the date of selection the lessee shall prove by two credible witnesses to the satisfaction of the said Commissioner that he or his bailiff has resided two years on the said land, and fenced in the whole with a

good and substantial fence, then the said Commissioner shall issue to such lessee a certificate that he has duly complied with the conditions of this Act, and the said lessee shall be entitled to a grant of the land in fee simple on the payment of the balance of the ten years' rent."

Sub-sect. 8 provides that no lease shall be transferred until the original selector has obtained the certificate mentioned in the above sub-sections.

Sub-sect. 9, which is material in one view of the case, is as follows:—

"If after a lessee has obtained a certificate by the Commissioner that he has duly completed the conditions of cultivation or improvement and residence required by this Act, he shall pay into the hands of the land agent a sum equal to the aggregate amount of the annual rents which would become due during the unexpired portion of the term of ten years' lease, together with the amount of the deed fee, such lessee shall be entitled to a deed of grant in fee simple of the lands comprised in such lease. If during the currency of any such lease the lessee shall not have duly fulfilled the conditions hereinbefore specified, then, on the expiration of the term of lease it shall absolutely cease and determine, and the lessee shall not have any claim whatsoever to any renewed lease, or priority of claim to either lease or to purchase the land comprised therein, or the improvements, or to compensation for any part thereof."

The 57th section of the Act, containing the provision on which the judgment of the Supreme Court rests, is as follows:—

"So soon as a lessee shall have made the last payment of instalments as hereinbefore provided, he shall be entitled to a grant in fee simple of the land leased to him, subject, however, to the payment of the fees chargeable on the issue of deeds of grant, and provided that he shall prove to the Governor in Council that he has faithfully complied with all the covenants and conditions contained in or implied by his lease under the provisions of this Act."

To revert to the facts of the case. On the 20th of March,

J. C. 1878 — FISHER v. TULLY.

1872, the Commissioner of Lands granted a certificate to the Appellant that he had by his bailiff resided on the land for two years and had properly fenced it; and it is not disputed that this certificate was duly obtained, and satisfied the requirements of the 6th and 7th sub-sections above set out.

On the 27th of June, 1872, the Appellant paid into the Colonial Treasury at *Brisbane* the aggregate amount of the rents for the unexpired portion of the term, together with the proper fee for a deed of grant, and the money was received at the Treasury and a receipt given for it by the authority of the Colonial Treasurer.

Having thus complied with the conditions of the 6th and 7th sub-sections, the Appellant applied to the Government for a grant in fee-simple, but was met by the objection that the declaration that he lived in *Queensland*, made on his application for the lease, was untrue, and that the Governor would on that ground withhold the grant. Thereupon the bill in this suit was filed.

The judgment of the Supreme Court proceeded on the ground that the Appellant was not entitled to a grant of the fee until, in addition to the certificate of the Commissioner, he had satisfied the provision of the 57th section, and proved to the Governor in Council "that he had faithfully complied with all the covenants and conditions contained in, or implied by, his lease under the provisions of this Act."

The Court also held that the decision of the Governor in Council was conclusive, but declared its opinion, if the question was open to the Court, that the declaration that the Plaintiff lived in *Queensland* was, in point of fact, untrue.

On the part of the Appellant, it was contended that, upon the true construction of the Act, his title to a grant was complete under the 6th, 7th, and 9th sub-sections of section 51, upon his obtaining the certificate of the Commissioner, and paying the full rent reserved by the lease, his learned counsel insisting that the provision in the 57th section was applicable only to leases which had expired by effluxion of time.

It is somewhat singular that the answer does not refer to the 57th section, nor in terms raise the objection as a bar to the suit, that the Appellant had not proved or offered to prove to the Governor in Council his compliance with the conditions of his

lease. If the 57th section is applicable to the case, it would seem to be clear that such a bill as the present could not be sustained until an offer, at the least, to give such proof had been made to the Governor in Council.

Their Lordships, however, in consequence of the opinion they have formed on the nature and effect of the declaration made on the application for the land, do not think it necessary to decide the question whether the 57th section applies to cases like the present, or whether, if it were applicable, the decision of the Governor in Council would be conclusive.

It may, however, be observed that even in the cases to which the 57th section is applicable, whilst it might be within the province of the Governor to determine conclusively whether the conditions of the tenure had been in fact performed, it is not to be assumed that his decision on the question of what are or are not conditions would, as supposed by the learned Chief Justice, be equally conclusive.

Passing, then, to the declaration itself, the first question to be considered is the meaning of the word "live." It is not a technical word, and was evidently used by the Legislature in a popular sense. So reading it, no one can reasonably doubt that the word implies something different from the transient presence in the colony of the applicant for land, and that it imports that the applicant is dwelling in *Queensland*, having made it, for the time at least, his home. This construction does not exclude his having residences in other places, where he may sometimes be consistently with *Queensland* being his then place of abode, nor does it require an intention on the part of the applicant to make the colony his permanent home, in the sense required to create a new domicile there.

The issue as to the truth of the declaration is distinctly raised in the pleadings. The bill alleges that the Plaintiff duly made "the solemn declaration required by the 53rd section" (which is nearly in the same terms as that required by sect. 46), and alleges also that the Governor pretended that the Plaintiff did not then live in *Queensland*, whereas he charged that he did then live in the colony within the meaning of the Act. The answer, as already stated, alleges that the declaration in this respect was untrue, and a fraud upon the Government.

J. C. 1878

FISHER v. TULLY.

How then does the evidence given in the cause, on this issue, stand?

The Appellant filed two affidavits, one sworn at *Melbourne* on the 8th of January, 1874, the other at *Sydney*, on the 13th of January, 1874.

The Appellant nowhere says in his first affidavit that he lived in *Queensland*, and although in this affidavit he states that he had residences in the three colonies of *Victoria*, *South Australia*, and *Queensland*, he does not say where they were situate, or of what nature they were, or that he ever occupied any particular "residence" in *Queensland*. The only mention in this affidavit of any particular place is that he describes himself as "of *Headington Hill, Darling Downs*, in the colony of *Queensland*."

The 2nd paragraph of this affidavit is as follows:—

"2. I first arrived in the colony of *Queensland* in the month of July, 1868, shortly after which I acquired the most part of the aforesaid property in *Queensland*. Since that time I have frequently visited and resided in the said colony of *Queensland*, and have also frequently visited and resided in each of the aforesaid colonies of *Victoria* and *South Australia*."

It is to be observed that this paragraph omits to point out any house or place where the Appellant at any time resided.

Still more significant is the manner in which the paragraph specially directed to the 29th of November, 1869 (the day of the application) is framed. All he ventures to say in it is that he had on that day residences in each of the three colonies, "ready to be occupied by me at any time at my option."

The second affidavit is still more general, and abstains altogether from giving particulars capable of being met and answered.

In the 4th paragraph he swears that "the declaration was true in substance and in fact." The 20th paragraph is as follows:— "At the time when I made the declaration as aforesaid, I was living in *Queensland*." Although he thus swears that he was living in *Queensland* at the time he made the declaration, he omits to supply the date of making it, which may have been some months before his application was tendered to the Commissioner, and he abstains from stating particular facts. The conclusion is

irresistible that he purposely refrained from doing so, finding himself unable to go beyond the loose statements already made in his first affidavit.

Affidavits by two land officers, Mr. *Hume* and Mr. *McDowell*, were filed on the part of the Government. Mr. *Hume* was staff surveyor of the district of *Darling Downs, Queensland*, and resided in it from 1865 to 1870. He also constantly visited the *Darling Downs* district after 1870, his family having continued to reside there. In his first affidavit the Appellant had described himself "of *Melbourne*, in the colony of *Victoria*; also of *Hill River* and *Bundaleer*, in the colony of *South Australia*; and of *Headington Hill, Darling Downs*, in the colony of *Queensland*." In his second affidavit he describes himself, after mentioning the other two colonies, "of *Talgai*, and *Headington Hill, Darling Downs*." Mr. *Hume* says that he became well acquainted with the residents in the *Darling Downs* district. He states that the residence called *Headington Hill* was built in 1868, and was occupied in that year and in 1869 by Mr. *Davenport*; and that another house known as *Headington Hill* was afterwards built, and occupied by Mr. *Davenport's* manager. He also says that the place called *Talgai* was during all the time he knew the district occupied by Mr. *Hanmer* and his family. He adds (paragraph 10) "The Plaintiff did not, to my knowledge or belief, ever live at either of the *Headington Hills* mentioned in my affidavit, or at *Talgai*, or elsewhere in *Queensland*, unless it may have been during some short visit to the colony." He says that about five years previously he was introduced to the Appellant by Mr. *Davenport*, but never met him in the colony upon any other occasion. Mr. *Hume* concludes his affidavit in these words:—

"A man of the Plaintiff's position could not have lived in this district or been in it for any length of time without my knowing it or having heard of it. I never knew or heard that the Plaintiff ever lived or resided in this district or in this colony, and I believe he has never been a resident of this colony."

It is difficult to have stronger negative evidence than this gentleman's affidavit supplies.

Mr. *McDowell* became Commissioner of Lands for the district of

J. C. 1878 FISHER v. TULLY.

Darling Downs on the 1st of January, 1870, and appears to have known the district only since that time. He says that the Appellant, at long intervals, used to visit the colony, remaining about four weeks at a time, but was never a resident of the district; and that, as far as he knows and believes, "he could only have lived at *Headington Hill* or elsewhere in the colony during his temporary visits thereto."

This evidence on the part of the Crown might not have availed against satisfactory proof on the part of the Appellant that he had lived in *Queensland;* but no such proof is forthcoming. Their Lordships have already commented on the unsatisfactory and defective nature of the Appellant's affidavits, and even the meagre statements contained in them are wholly unsupported by any witnesses on the part of the Appellant. It is obvious that if the Appellant had really lived in *Queensland* abundant evidence of the fact might have been produced. Moreover, the Appellant declined to submit himself to be cross-examined when the Government desired to do so. It appears that his legal advisers took some objection to the regularity of such a proceeding; but if the Appellant had chosen to meet the challenge of the Government, an opportunity would have been gained for explaining his real position.

Again, the omission of the month in the declaration, and the absence of any proof of the time when it was in fact made, are circumstances pregnant with suspicion.

Their Lordships are therefore driven to the conclusion, agreeing in this respect with the Judges of the Supreme Court, that the declaration is untrue.

Then could the Appellant have himself believed in its truth? Could he have mistaken the sense in which the word "live" was used in a declaration of this kind? In their Lordships' view it is impossible to suppose that a man of ordinary intelligence could so far misunderstand the meaning of the word as to believe that short and transient visits to the colony, which is the utmost that has been shewn to have occurred, would satisfy it. The facts were entirely within the personal knowledge of the Appellant, and if sheltering himself, it may be, under some assumed uncertainty of the meaning of the word "live," he chose to make the declaration without a *bonâ fide* belief in its truth, that would constitute

such misrepresentation as would in law defeat the contract, provided it is established that the declaration was of a material matter, and one of the inducements for entering into it.

On this point their Lordships think that the declaration was not only of a material matter, but that it formed one of the bases on which the contract was founded. The 46th and 53rd sections both require the declaration containing the representation that the Appellant lives in the colony to be made before a justice of the peace, and upon it, when made, the contract proceeds. It is also recited in the lease as the foundation of the grant. Further, it may be gathered from the general scope of the Act that residence in the colony was meant by the Legislature to be an essential qualification of applicants for lands of the class selected by the Appellant. The object was to encourage and obtain settlers in the colony.

The learned counsel for the Respondent, Mr. *Kekewich*, likened the present suit to one for specific performance, and cited *Cadman* v. *Horner* (1), and other decisions of the same class, in which the Court refused to exercise its jurisdiction to decree specific performance, where the Plaintiff had been guilty of misrepresentation, or did not come into Court with clean hands. There is no doubt an analogy between the cases, though it may not be complete, the intervention of the statute creating differences in some respects between the present contract and those which are purely personal. That the condition in question is imposed by a statute does not, however, create a distinction in favour of the Appellant, and therefore, upon the principle of the cases referred to, and independently of the 128th section of the Act of 1868, their Lordships think that the Appellant, who is an actor in this suit, and asks the Court to enforce a right springing from what he describes in his bill as a valid and subsisting statutory engagement, is not entitled to the relief he prays. In one of the cases referred to by the learned counsel for the Appellant, Mr. *Wood*, the Judges very clearly point out the distinction between suits brought to enforce contracts, and those brought to avoid them: *Feret* v. *Hill* (2); see also *Canham* v. *Barry* (3).

(1) 18 Ves. 10.
(2) 15 C. B. 207.
(3) 15 C. B. 597.

J. C. 1878 FISHER v. TULLY.

No questions of waiver, or of election to affirm the contract, arise in this case, there being an entire absence of evidence that the officers of the Government knew that the declaration was untrue, either at the time when the lease was granted, or when the rents were received.

Nor are their Lordships now called on to determine whether the Government is bound to repay to the Appellant the prepaid rents, or whether possession of the land can be retained by him until they are refunded. Questions of this kind might arise in a suit brought to avoid the contract, and recover the land.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the Supreme Court with costs.

Solicitors for the Appellant: *Cunliffe, Beaumont, & Davenport.*
Solicitors for the Respondent: *Freshfields & Williams.*

BIBL. LONDIN. UNIV